119-156

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~250.~~ 20

E. G. HANRICK, PLAINTIFF IN ERROR,

vs.

ELIZA M. O'BRIEN, PHILLIP O'BRIEN, AND WILLIAM BRADY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED AUGUST 16, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 256.

E. G. HANRICK, PLAINTIFF IN ERROR,

vs.

ELIZA M. O'BRIEN, PHILLIP O'BRIEN, AND WILLIAM BRADY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

INDEX.

	Original.	Print.
Caption	1	1
Petition	5	1
Exhibit A—Description of tracts of land	10	3
Answer	13	4
Third amended petition	16	5
Exhibit A—Description of tracts of land	21	7
Citation to E. J. Gurley	23	8
Marshal's return	25	9
Fourth amended petition	26	9
Answer to fourth amended petition	37	13
Exhibit A—Description of lands	42	15
B—Description of lands	47	17
C—Description of lands	48	17
Original answer of Wharton Branch, intervenor	54	20
John B. Sargent "	58	21
Answer to petition for leave to intervene	62	23
First supplemental petition	66	24
Exhibit O—Deed from James Hanrick *et al.* to Wm. Jenkins, Jr., February 1, 1878	105	37
W—Deed from John B. Sargent to Wharton Branch, February 4, 1878	108	39

JUDD & DETWEILER, PRINTERS, WASHINGTON.

2nd. A tract of land containing five leagues, more or less, and known as a grant of five leagues, to Pedro Zarza.

3d. A tract of land containing one league and known as the Rafael D'Aguire grant, all of said tracts of land being situated in the county of Falls, State of Texas, for a more particular description of which reference is made to Exhibit "A," hereto attached and made a part of this petition.

That said tracts of land are reasonably worth the sum of two hundred thousand dollars.

That the said Edward Hanrich left surviving him as his next of kin and sole heirs two brothers, named respectively John and James Hanrich, and one sister, named Elizabeth O'Brien, the widow of one Martin O'Brien, and one nephew by a deceased brother, to wit,
7 the defendant, Edward G. Hanrick. That the said John Hanrick died intestate and without lawful issue, he never having married, on the — day of ——, A. D. 1871, in the county of Wexford, Ireland, ever having been a citizen of the United Kingdom of Great Britain and Ireland, and being at the time of his death seized of the interest in said tract of land inherited by him from the said Edward Hanrick, deceased, to wit, an undivided one-fourth interest. That the said James Hanrick died intestate on the — day of ——, A. D. 1875, in the county of Wexford, Ireland, he also ever having been a citizen of said kingdom and being at the time of his death seized of the interest in said tracts of land inherited by him from the said Edward and John Hanrick, to wit, an undivided one-third interest in the same.

That the said James Hanrick left surviving him as his sole and only heirs five children, to wit, Nicholas, Annie, and Ellen Hanrick, Elizabeth Clare, and Catharine O'Neill, and four grandchildren, the children of a deceased daughter, to wit, Mary, Robart, Eliza, and Bridget Whelan.

That administration upon the estate of the said Edward Han-
8 rick was long since closed, and that the lands hereinbefore named have never been partitioned among his heirs or parties claiming under them. That under and by virtue of the general public statutory laws of the United Kingdom of Great Brittain and Ireland all the rights of citizens and natural-born subjects of said kingdom, both in and to the acquisition, taking, holding, and disposition of real and personal property of every description situated in said kingdom, are expressly given to and conferred upon aliens, and that by virtue of said laws a citizen of Texas or of the United States of America is entitled to all the rights and interests in and to real and personal property of every description situated in said kingdom that a citizen of said kingdom is entitled to, and a title to real and personal property of every description situated in said kingdom may be derived through, from, or in succession to a citizen of the United States in the same manner in all respects as though from or in succession to a citizen of said kingdom.

That on the — day of ——, A. D. 1878, the said Eliza
9 O'Brien, of Wexford county, Ireland, was, by virtue of the facts hereinbefore set forth, seized of an undivided one-third

interest in and to the tracts of land hereinbefore named. That on said day last named she conveyed all her right, title, and interest in and to the same to the said defendant, Eliza M. O'Brien, of the State of New York, then of the State of Massachusetts.

That afterwards, on the — day of ——, A. D. 1878, the said Eliza M. O'Brien, being still seized of the said undivided one-third interest, conveyed to her as aforesaid, did, by an instrument in writing duly executed and acknowledged, and joined by her husband, Philip O'Brien, convey to Wm. Brady, of New York, an undivided one-half of the undivided interest in said lands conveyed to her by the said Eliza O'Brien, thereby vesting in the said Brady an undivided one-sixth interest in the same.

That on said day last aforesaid the said Eliza M. O'Brien was, together with the said Wm. Brady, seized and possessed of an undivided one-third interest in and to said tract of land. That afterwards, to wit, on the 1st day of January, A. D. 1879, the said Edward G. Hanrick unlawfully entered upon and dispossessed plaintiffs of their interest in said tract of land and forcibly ejected
10 plaintiffs therefrom, and denies, and still denies, plaintiffs' right to enjoy the same, or any portion thereof, and withholds and has withheld from plaintiffs' possession thereof, or any part thereof, to plaintiffs' damage $100,000.

The premises considered, plaintiffs pray that the defendant be cited, as the law directs, to answer this petition, and that on final hearing they have judgment against said defendant, decreeing and vesting in them, or either of them, an undivided one-third interest in said tract of land described in said "Exhibit A" and that a writ of possession issue for same, and costs of suit and all other relief, both general and special, and plaintiff- will ever pray, etc.

J. T. BRADY,
Att'y for Plaintiffs.

The exhibit attached and made a part of the petition is in words and figures, to wit:

"EXHIBIT A."

I. *Tract Number One.*

The same containing eleven leagues of land originally
11 granted to Atanacia or Atanacio de La Serda, being situated in the county of Falls, State of Texas, on the east bank of the Brazos river, at and near the entrance therein of an old bed or channel called the old bed of the river, and bounded and described as follows, to wit:

Beginning at a stake on the bank of said river near the old bed aforesaid, from which a sycamo*ur*- ten in. dia. bears S. 47° W. 15 varas distant, and another 15 in dia. bears S. 84½ W. 21 varas; thence running S. 62 E. 27,626 varas to a stake in prairie; thence N. 28 W. 10,000 varas to a stake in prairie; thence running north 62 W. 28,976 varas to a stake in bank of said river, from which a poplar 12 in. bears S. 58 E. 10 varas, and another 6 in. dia. bears S.

8¾ E. 22 varas; thence following the meanders of said river to the place of beginning.

II. *Tract Number Two.*

The same being in two bodies of land situated in Falls county, State of Texas, formerly granted by the proper officers of the State of Cohuila and Texas to Pedro Zarza by his attorney-in-fact, Robert M. Williams, and described and bounded as follows:

The first of said bodies of land, containing four leagues,
12 more or less, adjoining the survey of Ignacio Golinda, beginning at the lower corner of said survey on the right *of* bank of the Brazos river; thence S. 62 W. following the lower line of said survey 19,330 varas to the second corner of this tract; thence S. 28 E. 5,000 varas to the third corner; thence N. 62 E. 21,730 varas to the Brazos river for the north corner; thence up the river with its meanders to the place of beginning. The other tract of land, containing one league, beginning at the west or northwest corner of the survey of the two leagues of Juan Jose Acosta; thence S. 62 W. 10,000 varas; thence S. 28° E. 5,000 varas; thence N. 62 E. 10,000 vaaas; thence N. 28 W. to the place of beginning.

Tract Number Three.

A tract of land containing one league, more or less, the same being a portion of eleven leagues of land granted to Rafael de Aguire, being situated in Falls county, Texas, on a branch of Cow Bayou: Beginning at the S. W. corner of two leagues of land granted to Juan Jose Acosta, which is a stake in the up-er boundary of four leagues granted to Jose Antonio Monchaca, from
13 which a cedar 5 in. dia. bears N. 47° E. 14 varas distant, and an elm 6 in. dia. bears S. 32 W. 10,000 varas to stake in boundary for the second corner; thence W. 28° W. 2,500 varas to the S. W. corner of a league of land granted to Pedro Zarza; thence N. 62 E. with the southeast boundary 10,000 varas to the S. E. corner in S. W. boundary of the land of Acosta; thence S. 28 E. to the beginning.

Answer of E. G. Hanrick.

Answer of Edward G. Hanrick. Process issued to the defendant, and on the 6th day of April, A. D. 1880, the following demurrer and answer filed, endorsed, to wit: No. 14. Eliza M. O'Brien *et al. vs.* E. G. Hanrick. Filed April 6th, A. D. 1880. J. H. Finks, clerk. Goodrich and Clarkson, att'ys.

In U. S. Circuit Court for the 5th Circuit and Northern District of Texas at Waco.

ELIZA M. O'BRIEN *et al.*
vs.
E. G. HANRICK. } No. 14.

Comes the defendant in the above-styled cause by his attorneys, and, excepting to plaintiffs' petition herein filed, says: The same is insufficient, because——

14 1st. It appears from said petition that all persons interested in the subject-matter in controversy are not made parties.

2nd. Because it appears from said petition that the vendor of plaintiffs was, at the date of the death of Edward Hanyick, viz., in 1865, an alien, and not entitled to inherit any portion of the estate of said deceased, situated in the State of Texas, nor does said petition show any right in plaintiffs.

3d. Because it appears that nine years and more have elapsed since the death of said Edward Hanrick: wherefore if the plaintiffs or their vendor ever had right they are now barred by lapse of time.

4th. And further excepting to that part of said petition which alleges that in 1870 a general public statutory was enacted in said Kingdom of Great Brittain, conferring on aliens the full rights of natural-born subjects of said kingdom, because the same can have no effect upon rights vested before that time, and because the same presents no issue material to the determination of this cause:

15 wherefore the same should be struck out.

GOODRICH & CLARKSON,
For Def't E. G. Hanrick.

And further this def't demurs and says that said petition presents no cause of action against this def't, and of this he prays judgment of the court.

And, answering said petition, this def't denies all and singular the allegations therein contained and demands proof.

And, further answering, this def't comes and defends the wrongs, injuries, and tresspasses therein charged against him, and says that he is not guilty as therein alleged, and puts himself upon the country.

GOODRICH & CLARKSON,
Atty's for E. G. Hanrick.

16 And afterwards, on August 4th, A. D. 1882, the following third amended petition was filed, endorsed, to wit:

"No. 14. U. S. circuit court. Eliza M. O'Brien *et al. vs.* Ed. G. Hanrick. 3d amended petition. Filed August 4th, 1882. J. H. Finks, clerk."

Which is in words following:

3d Amended Petition.

In the Circuit Court of the United States for the Northern District of Texas, at Waco.

ELIZA M. O'BRIEN *et al.*
vs.
EDWARD G. HANRICK. } No. 14.

To the honorable judges of said court:

And now comes the plaintiffs in the above-entitled cause and, with leave of the court first had and obtained, withdraw their second

amended petition filed in said cause on the — day of ——, and file this their 3d amended original petition in lieu thereof and say:

Your petitioners, William Brady and Eliza M. O'Brien, joined by her husband, Philip O'Brien, hereinafter styled plaintiffs, complaining of Ed. G. Hanrick and Ed. J. Gurley, hereinafter
17 styled defendants, would respectfully represent unto your that plaintiffs reside in the county and State of New York and are citizens of State, and that defendants reside in the county of Falls, State of Texas, and are citizens of the State of Texas.

That heretofore, to wit, on the — day of ——, 1865, one Edward Hanrick died intestate and left surviving him as his sole and only heirs one sister named Eliza, otherwise Elizabeth O'Brien, the wife of one Martin O'Brien, deceased, and two brothers named, respectively, John and James Hanrick, and one nephew, the defendant, Edward G. Hanrick. That said Edward Hanrick died seized and possessed in fee-simple of the lands described in Exhibit "A" hereto attached and made a part of this petition, the same being of the value of $200,000. That on the — day of ——, 1871, the said John Hanrick died intestate and without issue of body, he never having married, and being at the time of his death still seized of the interest in said lands inherited by him from the said deceased Edward. That on the — day of ——, 1875, the said James Hanrick died intestate and being at the time of his death still seized of the interest in said lands which be had inherited from the deceased Ed-
18 ward. That the said James Hanrick left surviving him as his sole and only heirs five children, to wit, the said Annie, Ellen, and Nicholas Hanrick and the said Elizabeth Clare and Catharine O'Neil, and four grandchildren by a deceased daughter, the wife of the said Peter Whelan, to wit, the said Mary and Bridget and Eliza and Robert Whelan.

That on the — day of ——, 1878, the said Eliza O'Brien did convey to the said Eliza M. O'Brien, by deed of gift, all her interest in the lands described in said exhibit, the same being, as shown by the facts hereinafter set forth, an undivided one-third interest therein, and that afterwards, to wit, on the — day of ——, A. D. 1878, the said Eliza M. O'Brien, joined by her husband, the said Philip, did convey to the said Wm. Brady one-half of the interest in said lands conveyed to her as aforesaid by the said Eliza O'Brien, sister of the deceased Edward, the same being an undivided one-sixth interest in said estate. That thus, by virtue of the facts set forth above, the said Eliza M. O'Brien and the said Wm. Brady were together, on the — day of January, A. D. 1879, seized in fee-
19 simple of an undivided one-third interest in said lands; that afterwards, to wit, on the — day and year last aforesaid, the said Ed. J. Gurley and Ed. G. Hanrick did unlawfully enter upon said lands and forcible eject plaintiff therefrom, and have since withheld from them possession of the same to their damage $50,000. That at the time of the death of the said Edward Hanrick the said John and James Hanrick and the said Eliza O'Brrien, sister of the deceased Edward, were, and ever since continued to be, citizens of the United Kingdom of Great Britain and Ireland. That under

and by virtue of the general public statutory laws of said kingdom a title to real estate and personal property of every description situated within said kingdom may be devised through, from, or in succession to a citizen of the United States in the same manner in all respects as through, from, or in succession to a subject of said kingdom, and real and personal property of every description situated in said country may be acquired, held, and disposed of by a citizen of the United States in the same manner in all respects as by
20 a subject of said kingdom. That since the first day of January, 1873, the said Ed. G. Hanrick has been in possession of said lands to the exclusion of plaintiff, having denied, and still denying, their right to participate in the enjoyment of the use of same or of any part thereof, and has forcibly prevented, and still forcibly prevents, them from so doing. That the annual value of the rents and profits, and of the use and occupation of said lands by the said Ed. G. Hanrick, is the sum of ten thousand dollars per year for each year since said date, 1st day of January, 1873, down to the present time. That the said Ed. G. Hanrick has cut, felled, and carried away from said lands valuable growing trees since the 1st day of January, 1878, the same being of the value of $10,000, all of which he has appropriated to his own use and benefit.

The premises considered, plaintiffs pray that the defendant be cited, as the law directs, to answer this petition; that on final hearing they have and recover of the said Ed. J. Gurley and Ed. G. Hanrick an undivided one-third interest in said lands, and that a writ of possession issue for the same, and that they also have and
21 recover of the said Ed. G. Hanrick the sum of $3,333.33 for each year since the first day of January, 1873, the same being their *pro rata* share of said rents and profits, and that they also recover of the said Hanrick the sum of $3,333.33, the same being their share of the damages occasioned by the destruction of said growing timber, and for all other relief, both general and special, to which the plaintiffs may, in the opinion of your honors, be entitled, and plaintiffs will ever pray, etc., etc.

JOHN T. BRADY,
Att'y for Plaintiffs.

EXHIBIT A.

1st. A tract of land containing eleven leagues of land, granted to Antonio De La Serda, situated in Falls county, Texas.

2nd. A tract of land containing five leagues, granted to Pedro Zarza, situated in Falls county, Texas.

3d. A tract of land containing one league, granted to Rafael D. Aguire, situated in Falls county.

22 4th. A tract of land containing ten leagues, granted to Rafael D. Arguire, situated in Williamson county, Texas.

5th. A tract of land containing eleven leagues, granted to Miguel Davilla, situated in the counties of Bell, Milam, and Williamson, Texas.

6th. A tract of land containing one league, granted to Andrew Weaver, situated in the county of Liberty, Texas.

7th. A tract of land containing one-half league, granted to J. and W. De Rumze, situated in the county of Liberty, Texas.

23 And afterwards on August 5th, A. D. 1882, the following citation was issued and endorsed, to wit:

Citation to Ed. J. Gurley.

U. S. Circuit Court, Northern District of Texas, at Waco.

ELIZA M. O'BRIEN *et al.*
vs.
EDWARD G. HANRICK. } No. 14.

Citation to Ed. J. Gurley, Falls county. Issued 5th day of August, A. D. 1882.

J. H. FINKS, *Clerk.*

And further endorsed, to wit: Returned and filed 8th day of August, A. D. 1882. J. H. Finks, clerk.

The citation is as follows, to wit:

United States Circuit Court, Fifth Circuit and Northern District of Texas, at Waco.

The President of the United States of America to the marshal of the northern district of Texas, Greeting:

You are hereby commanded to summon Ed. J. Gurley, a resident citizen of the county of Falls, if to be found in your district, to be and appear before the honorable circuit court of the United
24 States, at the next regular term thereof, to be holden for the fifth judicial circuit and northern district of Texas, at the court-room thereof, in the city of Waco, on the first Mandy, it being the second day of October next, to answer the third amended petition in case No. 14, filed on the fourth day of August, 1882, of William Brady and Eliza M. O'Brien, joined by her husband, Philip O'Brien, Plaintiffs, against Ed. G. Hanrick and Ed. J. Gurley, defendants.

The nature of the plaintiffs' demand is as follows, to wit: An action to try title as well as for damages, as more fully appears by the accompanying certified copy of third amended petition, of which you will serve the said Ed. J. Gurley with the accompanying certified copy of said petition and Exhibit "A," also with a true copy of this writ. Herein fail not, and due return of this writ make.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the circuit court thereof, at Waco, this 5th day of August, in the year of our Lord eighteen hundred and eighty-two, and of the American Independence the 106th year.

[The Seal of the U. S. Circuit Court, N. D. of Texas. Waco.]

J. H. FINKS,
Clerk of said Court.

25 *U. S. Marshal's Return.*

The U. S. marshal's return upon the foregoing citation is as follows: Received this writ on the 5th day of August, 1882, and I executed the same on the 7th day of August, 1882, by delivering to the within-named defendant, Ed. J. Gurley, in person, a certified copy of the third amended petition in this case, and Exhibit A—also a true copy of this writ.

A. B. NORTON,
U. S. Marshal Northern District of Texas.
By W. F. LYNCH,
Deputy.

26 And afterwards, on October 3d, 1882, the fourth amended original petition was filed, endorsed, to wit:

No. 14, U. S. Circuit Court. Eliza M. O'Brien *et al. vs.* Ed. G. Hanrick. Plaintiff's 4th original amended petition. This action is brought as well to try title as for damages. Filed Octo. 3d, 1882. J. H. Finks, clerk.

Which is in words and figures following, to wit:

Plaintiffs' 4th Amended Petition.

ELIZA M. O'BRIEN *et al. vs.* EDWARD G. HANRICK.

In Circuit Court of the United States for the Northern District of Texas, at Waco.

To the honorable judges of said court:

And now come the plaintiffs in the above-entitled cause, and having dismissed the same as to Ed. J. Gurley, with leave of the court first had and obtained, withdraw their third amended petition, filed on the 4th day of August, A. D. 1882, and substitute this their 4th amended petition in lieu thereof, and say that your petitioners,

27 Eliza M. O'Brien, joined by her husband, Philip O'Brien, and William Brady, all of whom are hereinafter styled plaintiffs, complaining of Edward G. Hanrick, hereinafter styled defendant, would respectfully represent and show unto your honors: That said Eliza M. O'Brien and her said husband, Philip O'Brien, and the said William Brady, reside in the city of New York, State of New York, and that they are citizens of said State of New York, and that the defendant, Edward G. Hanrick, resides in the county of Falls, State of Texas, and is a citizen of said State. That heretofore, to wit, on the —— day of ——, A. D. 1865, one Edward Hanrick died in Montgomery county, State of Alabama, intestate, and without issue of body, he never having married.

That he left surviving him as his next of kin and sole and only heirs at the time of his death one sister, named Elizabeth O'Brien, two brothers, named respectively John and James Hanrick, and one nephew, named Edward G. Hanrick, the defendant, he being the son and only child of one Philip Hanrick, who died in the year A. D. 1852, and who was another brother of the said Edward Hanrick.

That the said Elizabeth O'Brien resides in the county of Wexford, Ireland, and is, and ever hath been, an alien to the United States and a subject of Great Britain.

28 That the said John Hanrick died intestate and without issue, he never having married, in the year A. D. 1870, in said county of Wexford, Ireland, he ever having been an alien to the United States, a subject of Great Britain. That the said James Hanrick died intestate in the year A. D. 1875, in said county of Wexford, he also ever having been an alien to the United States and a subject of Great Britain. That the said James Hanrick left surviving him as his next of kin and only heirs four daughters, named respectively Elizabeth Clare, Catharine O'Neil, Annie, otherwise Honora Hanrick, and Ellen Hanrick, and four grandchildren, the children of a deceased daughter, and named respectively Mary, Elizabeth, Bridget, and Robert Whelan, and one son named Nicholas Hanrick.

That the said descendents of the said James Hanrick resides in Ireland, except the said Nicholas, Annie, otherwise Honora, and Ellen Hanrick, who reside in county of New York, State of New York.

That on the — day of ——, A. D. 1870, a general public statutory law was enacted in said Kingdom of Great Britain which hath

29 been ever since and still is in full force and effect in said kingdom, which expressly extended to and conferred upon all aliens to said kingdom all the rights of natural-born subjects of said kingdom both in and to the acquisition, taking, holding, and disposition of real and personal property of every description situate within said kingdom, and expressly declared that a title to real and personal property of every description within said kingdom should be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural born subject of said kingdom. That under and by virtue of said statutory enactment a citizen of the United States became entitled to, and still is entitled to, all the rights of natural-born subjects of said kingdom both in and to the acquisition, taking, holding, and disposition of real and personal property situated within said kingdom, and a title to real and personal property of every description whatsoever situate within said kingdom may be derived through, from, or in succession to a citizen of the United States in the same manner in all respects as through, from, or in succession to a natural-born subject of said kingdom.

30 That the said Edward Hanrick died seized and possessed of the following-described tracts of lands, owning the same in fee-simple, and the same being situate in the county of Falls, State of Texas.

Tract number one, a certain tract of land known as the Atunacia de La Serda Eleven-league grant, situated in the county of Falls, on the left bank of the Brazos river, and bounded as follows, to wit: Beginning at a point where an old channel enters said river, called old bed of river, at a stake, from which fifteen varas a — ten in. dia. bears south 47° west and at 20 W. another, 15 in. dia., a hackberry,

ten inches in dia., and twenty-one varas south 84½° west another; thence N. 62 E. 27,626 varas, crossing a creek, called Isaac's creek, to a stake in the plain for a corner; thence N. 28° W. 10,000 varas to another stake in the plain; thence S. 62° W. 28,966 varas to a stake in the margin of said river, from which, 10 varas S. 38½° E., a cottonwood, 12 in. dia., another 6 in. dia., bears S. 8¾° E.; thence down the said Brazos river with its meanderings to the place of beginning and comprehending within its bounds one deed of
31 eleven leagues of land, which said tract of land was granted to Mathew R. Williams as attorney for the said Antonacia de La Serda on the — day of ——, A. D. 1833.

Tract number two, containing two parcels of land, situated in said county of Falls, State of Texas, formerly granted by the proper officers of the State of Coahuila and Texas to Pedro Zarza, by his attorney-in-fact, Robert L. Williams, and described as follows, to wit:

The first of said tracts containing four leagues of land, more or less, adjoining the survey of Ignacio Galinda, beginning at the lower corner of said survey, on the right bank of the Brazos river; thence south 62° W., following the lower line of said survey, 19,330 varas, to a stake, for second corner of this tract; thence S. 28° E. 5,000 v's to the third corner; thence N. 62° E. 21,730 varas to the Brazos river, for the fourth corner; thence up the river with its meanders to the place of beginning.

The second of said tracts containing one league of land and beginning at the west or northwest corner of the survey of two
32 leagues of Juan Jose Acosta; thence S. 62 W. 10,000 varas; thence S. 28 E. 2,500 varas; thence N. 62 E. 10,000 varas; thence N. 28° W. to the place of beginning.

Tract Number Three.

The same being a tract of land lying and being in the county of Falls, and described as a part of the eleven-league tract granted to Rafael de Aguire, situated on a branch of Cow Bayou:

Beginning at the southwest corner of two leagues of land, granted to Juan Jose Acosta, which is a stake in the upper boundary of four leagues, granted to Jose Antonio Manchaca, from which a cedar five in's in diameter bears N. 47° E. 14 v's, and an elm 6 in. in dia. bears S. 32° W. 9 v's; thence running south 62 west 10,000 varas to a stake planted in the said boundary for the second corner; thence N. 28° W. 2,500 varas to the southwest corner of a league of land, granted to Pedro Zarza; thence N. 62° E. with the southeast boundary 10,000 varas to the southeast corner in southwest boundary of the land of Acosto; thence S. 28° east to the place of beginning, including one league of land more or less according to the original survey.

33 Plaintiffs further represent that said tracts of land, of which the said Edward Hanrick died seized and possessed, are reasonably worth the sum of $200,000.

That there are on said tract of land, hereinbefore described, and

known as the Pedro Zarza grant, two plantations, each containing about one thousand acres of improved and til-able lands, and known and described respectively as "Hanrick's Prairie and Bottom Farms" that the same are in the exclusive possession of the said defendant, Edward G. Hanrick, together with all the other tracts of land hereinbefore described, and that the said Edward G. Hanrick for many years past has appropriated, and still continues to appropriate, to his own exclusive use and benefit all the rents and profits arising from said tracts of land, and from said two plantations, said rents and profits being reasonably worth the sum, to wit, fifteen thousand dollars per annum.

That all debts and claims against the estate of the said Edward Hanrick, deceased, if any ever existed, have long since been paid off and discharged; and that administration on the same has been closed; and that said estate and said tracts of land hereinbe-
34 fore described have never been partitioned among the heirs of the said Edward Hanrick, deceased.

That the said John Hanrick died seized and possessed of the undivided interest in the estate of the said Edward Hanrick, deceased, and in and to the said tracts of land hereinbefore described, which, as is shown by the facts hereinbefore stated, he inherited from the said Edward Hanrick, deceased, to wit, an undivided one-fourth interest in the same.

That on the — day of ——, A. D. 1878, the said Eliza O'Brien was, by virtue of the facts hereinbefore shown, seized and possessed of an undivided one-third interest in an- to the said estate of the said Edward Hanrick and in and to the said tracts of land hereinbefore described; that on the day and year last aforesaid the said Eliza O'Brien conveyed to the said plaintiff, Eliza M. O'Brien, all her right, title, and interest in and to the lands hereinbefore described, she, the said Eliza M. O'Brien, being then the daughter-in-law of the said Eliza O'Brien, of Ireland, and said conveyance having been made for the separate use and benefit of the said Eliza M. O'Brien, and that by virtue of said conveyance and by virtue of other conveyances from and under the said Eliza O'Brien, of
35 Ireland, the said Eliza M. O'Brien was, on the — day of ——, A. D. 1878, seized and possessed in her own separate right of an undivided one-third interest in the same.

That afterwards, to wit, on the day and year last named, the said Eliza M. O'Brien, joined by her said husband, Philip O'Brien, for a valuable consideration, conveyed unto the said plaintiff, William Brady, one-half of the said undivided interest in said lands conveyed to her by the said Eliza O'Brien, to wit, an undivided one-sixth interest in the same, and that thereby the said William Brady became seized and possessed of an undivided one-sixth interest in and to the lands hereinbefore described.

That on the 1st day of January, A. D. 1879, the said plaintiff, Eliza M. O'Brien, joined by her husband, Philip O'Brien, and the said William Brady, were, by virtue of the facts hereinbefore stated, seized and possessed in fee-simple of an undivided one-third interest in and to the lands hereinbefore described, and were in possession

of the same and were entitled to the possession of the same; that afterwards, to wit, on said day and year last aforesaid, the said defendant, Edward G. Hanrick, unlawfully entered upon and dispossessed plaintiffs of said lands, ejected them therefrom, and
36 still withholds from them possession thereof, or of any portion of the same, to plaintiffs' damage $50,000 dollars.

Wherefore the plaintiffs pray, the premises considered, that the defendant be cited as the law directs to answer this petition, and that on final hearing plaintiffs have judgment against defendant, and recover of the said defendant an undivided one-third interest in and to said lands, and that a writ of possession issue to them therefor, and that they recover their costs and all other relief, both general and special, to which, in the opinion of your honors, they may be entitled to; and plaintiffs will ever pray.

BRADY & RING,
Att'ys for P'tiffs.

37 And afterwards, on April 3d, 1883, the following answer of the defendant to the plaintiffs' 4th amended original petition was filed, endorsed, to wit:

No. 14. Eliza M. O'Brien *et al. vs.* E. G. Hanrick. Answer to plaintiffs' 4th amended original petition. Filed April 3d, 1883. J. H. Finks, clerk.

Which is in words and figures, to wit:

Answer to Plaintiffs' 4th Amended Original Petition.

In U. S. Circuit Court, 5th Circuit and N. D. of Texas, at Waco.
Oct'r Term, 1882.

E. M. O'BRIEN *et al. vs.* E. G. HANRICK.

Comes the defendant, E. G. Hanrick, by his attorneys, and answering the 4th amended petition of plaintiffs herein filed, says:

1st. That said petition is insufficient in law and shows no right in p't'ffs to have and maintain said suit; & of this def't prays judgment.

38 2d. And for special ground of demurrer and exception to said petition this def't says that it appears therefrom that plaintiffs are tenants in common, and cannot, therefore, join in this action to recover their said several interests; & of this def't prays judgment.

3d. It appears from said petition that other parties therein named—viz., Nicholas Hanrick, Annie Hanrick, Ellen Hanrick, and others—are necessary parties to this suit; & of this def't prays judgment.

4th. It appears from said amended petition that the plaintiffs therein claim title to the lands sued for by another and different right and title than that set up in their previous pleadings, and is in substance and form a new suit; wherefore defendant prays that plaintiffs be adjudged to pay costs accrued up to the date of filing said amendment.

5th. It appears from said petition that more than nine years had elapsed from the date of the death of Edward Hanrick, the alleged ancestor, before the alleged alien heir, Elizabeth O'Brien, sold said lands so inherited to the plaintiffs or brought suit to recover
39 the same, she being an alien and not in possession thereof; wherefore pl't'ffs are barred.

6th. And, further answering said petition, def't denies all and singular the allegations therein contained and demands proof.

7th. And, further answering said petition, this def't comes and defends the wrongs, injuries, and trespasses therein alleged against him, and says that he is not guilty of the same as therein charged against him, & of this he puts himself upon the country.

GOODRICH & CLARKSON,
Att'ys for D'f't.

And further, this defendant avers that he claims, as the owner in fee, an undivided two-thirds interest in and to the several tracts of land described in Exhibits "A, B, and C, hereto attached and made part of this plea, the said tracts being parts and parcels of the land sued for by pl't'ffs and described in said petition, the other undivided one-third interest being the property of his cotenant, E. J. Gurley, who resides in Falls county, in the State of Texas, and def't
40 avers that he and his said cotenant jointly occupy, use, and possess the above-mentioned lands.

And, specially in bar of plaintiffs' action, this defendant avers that, as to the said interest in the above-mentioned tracts of land, he and those whose estate he has, have had, and held peac-able, continuous, exclusive, adverse possession of the same for three years & more before the institution of this suit, claiming the same under title and color of title by regular chain of transfer from the sovereignty of the soil down to him, & this he is ready to verify.

And further, specially in bar, this def't avers that he and those whose estate he has and holds in the aforesaid lands have had and held peaceable, continuous, exclusive, adverse possession of the same for five years and more before the institution of this suit, claiming the same under deeds duly recorded, cultivating, using, and enjoying the same and paying all taxes due thereon, & this he is ready to verify.

And further, specially in bar, this def't avers that he and those whose estate he has and holds in the aforesaid lands have had and held peaceable, continuous, exclusive, adverse possession of
41 the same for more than ten years before the institution of this suit, cultivating, using, and enjoying the same, claiming good right and title thereto, & this he is ready to verify.

GOODRICH & CLARKSON,
Att'ys for Def't.

And answering further this def't avers that for one year and more before the institution of this suit he has had adverse possession of the aforesaid lands in good faith, claiming title thereto by transfer from the sovereignty of the soil; that during his occupation of said

premises he has erected and constructed large, valuable, and permanent improvements thereon, consisting of clearing and putting lands in cultivation, fencing the same, building dwellings & other houses thereon, and digging wells, besides various other improvements necessary to prepare said lands for occupation and cultivation, all of the value of fifty thousand dollars: wherefore he prays that if pl'ffs recover that he have judgment for the value of his said improvements; also for general relief.

GOODRICH & CLARKSON,
Att'ys for Def't.

42 EXAIBIT A.

An undivided two-thirds interest in a tract of land described as follows: Beginning at the N. W. corner of a 29-acre tract sold to M. S. Parton out of the N. E. corner of the La Serda grant; thence S. 30 E. with the west line of the said Parton tract 447 v's to his S. W. corner; thence N. 60 E. with his south line 152 varas to the N. W. corner of G. W. Parton tract of 31 acres; thence S. 28 E. with his west line 921 v's to his S. W. corner; thence S. 62 E. with his south line 200 v's to his S. E. corner in the east line of the La Serda grant; thence S. 28 E. with s'd east line about 3,600 v's to the upper corner of C. R. Lang's 138-acre tract, in the bed of Big creek; thence down Big creek with its meanders to the point where the north line of Sam Bell's 493-acre tract strikes s'd creek; thence S. 62 W. with s'd Bell's north line 1,220 v's to his N. W. corner; thence S. 24 E. with his west line 980 v's to Big creek; thence S. 65 E. with his S. W. line 680 v's to his S. W. corner and the N. E. corner of L. D. Forbes' 900-acre tract; thence S. 60 W. with Forbes' north line to Big creek; thence down Big creek to Forbes' N. W. corner; thence S. 28 E. with Forbes' west line 1,614 v's to Garrett's 218-acre northeast corner; thence S. 79 W. with Garrett's north line 890 v's to
43 his northwest corner, in the east line of the Smith 220-acre tract; thence N. 28 W. with Smith east line 350 v's to his N. E. corner; thence S. 62 W. with Smith north line 920 v's to the east line of a tract sold to Smith by Barclay; thence N. 30 W. with s'd east line about 1,750 v's to the northeast corner of s'd tract; thence S. 60 W. with the north line of s'd tract 310 v's to his N. W. corner & Mrs. Steele's S. E. corner, in the bed of Bensley creek; thence up Bensley creek with its meanders to the N. E. corner of John Fairy's 70-acre tract; thence N. 80 W. with Fairy's north line 810 v's to his north corner; thence S. 62 W. 137 v's to his N. W. corner; thence with Fairy's lines to his S. W. corner in Mrs. Steeles' N. W. corner; thence south 28 E. with her west line 800 v's to her southwest corner; thence N. 60 E. with her south line 750 v's to her S. E. corner & R. Smith's N. W. on Brusley creek; thence S. 30 E. with Smith's west line, about 1,050 v's to Big Creek; thence down Big Creek with its meanders to the S. E. corner of Wm. Kimbrough's 150-acre tract; thence N. 28 W. with Kimbrough's east line 1,032 v's to his N. E. corner; thence S. 28 W. with his north line 730 v's to his N. W. corner; thence S. 28 E. with his west line 1,360 v's to Big Creek; thence up Big Creek with its meanders to

the N. W. corner of a 65-acre tract, sold to R. Smith; thence S. 28 E. with Smith's west line 1,210 v's to his S. W. corner in T. A. Saul's line; thence S. 60 W. with Saul's N. line about 1,100
44 v's to the line of W. S. Hunnicutt's 214-acre tract; thence N. 30 W. with s'd Hunnicutt's E. line, about 425 v's to his N. E. corner; thence S. 60 W. with his N. line 800 v's to his N.W. corner, in the E. line of the Sessum's league; thence N. 30 W. with Sessum's E. line, & Cockrell's & Wren's east line, about 2,930 v's to s'd Cockrell & Wren's N. E. corner (passing Sessum's N. E. at 3,400); thence down the main prong of Cedar creek to the N. line of Sessum's league (s'd prong being the N. W. boundary of the s'd Cockrell and Wren's tract), about 3,880 v's to the N. W. corner of s'd league; thence S. 30 E. with W. line of s'd league 3,032 v's to the S. line of the La Serda grant; thence S. 62 W. with s'd S. line, about 4,460 v's to the W. line of the McGarey quarter of a league; thence N. 30 W. with s'd W. line, about 1,375 v's to the S.W. corner of the Moore tract; thence N. 30 E., about 2,075 v's to Ellis Stewarts S. E. corner; thence N. 30 W. with Stewart's E. line 950 v's to his N. E. corner; thence S. 60 W., about 2,075 v's to the lower line of the T. J. Chambers' 11-league tract; thence N. 45 E. with said line, about 2,750 v's to the W. line of B. F. Williams' 80-acre tract; thence S. 28 E. with s'd W. line 128 v's to his S. W. corner; thence N. 60 E. with his S. line 817 v's to his S. E. corner, on Big Sandy creek; thence with the meanders of s'd creek to the lower line of the T. J. Chambers' grant; thence with s'd line N. 45 E. to the W. line of the Riddle tract;
45 thence S. 28 E. with Riddle W. line about 225 v's to the S. W. corner of Riddle tract; thence N. 62 E. with Riddle S. line about 1,250 v's to his S. E. corner; thence N. 28 W., about 850 v's to his N. E. corner; thence S. 62 W. with his N. line about 550 v's to Levy's S. E. corner, on Little Sandy creek; thence S. 62 W., with his north line about 600 v's to the N. E. corner of Lane's 2,268-acre tract; thence N. 45 W. with his N. E. line about 1,500 v's to his N. corner; thence S. 45 W. with his N. W. line about 2,450 v's to the S. E. corner of Lane's 200-acre tract; thence N. 28 W. with E. line of s'd 200 acres about 800 v's to the N. E. corner of the same in Nicholson's S. line; thence with Nicholson's S. line about 1,250 v's to his S. E. corner; thence N. 28 W. with his E. line about 700 v's to his N. E. corner, on Springfield road; thence S. 62 W. with his N. line about 1,550 v's to his N. W. corner; thence S. 28 E. with his W. line about 800 v's to his S. W. corner in N. line of Lane's 200 acres; thence with Lane's N. line to his N. W. corner; thence S. 28 E. with his W. line about 800 v's to his S. W. corner in N. line of Lane's 200 acres; thence with Lane's N. line to his N. W. corner; thence S. with Lane's W. line to the N. E. corner of W. Gresham's 640-acre tract; thence with N. line of s'd 640-acre tract to the S. E. corner of the Scott 40-acre tract; thence N. with Scott E. line about 550 v's to the S. line of Schooley's tract; thence E. to the S.
46 E. corner of Schooley's tract; thence N. 28 W. with the E. line of Schooley's & Carter's tract about 1,750 v's to the Central railroad; thence up s'd railroad to the N. line of the La Serda grant; thence N. 62 E. with s'd line about 6,636 v's to the Wilsford

N. W. corner; thence with Wilford's west line to his S. W. corner on road; thence N. 45 E. with Wilford's S. line to his S. E. corner in road; thence N. 28 W. with his E. line to the N. line of the La Serda grant; thence N. 62 E. with s'd N. line 1,973 v's to the N. W. corner of Mrs. Dwight's 217-acre tract; thence S. 28 E. with her W. line 1,225 v's to her S. W. corner; thence N. 62 E. with her S. line 1,000 v's to her S. E. corner; thence N. 28 W. with her E. line 1,225 v's to her N. E. corner in the La Serda north line 6,204 varas to the place of beginning.

Excepting out of the above and foregoing described tract—

A tract of 60 acres of land in the possession of John Ashworth.
A tract of 214 acres in the possession of T. B. Watson.
A tract of 50 acres in the possession of —— Carter.
A tract of 100 acres in the possession of T. D. Reed.
A tract of 100 acres in the possession of F. F. Green.
A tract of 100 acres in the possession of James Taylor.
A tract of 80 acres in the possession of Green Taylor.
A tract of 120 acres in the possession of W. Stubblefield & Bro.
A tract of 50 acres in the possession of Floyd Smith.
A tract of 80 acres in the possession of G. Blankenstein.

47 A tract of 100 acres in the possession of Jacob Wheeler.

Two tracts of fifty acres each in the possession of John McClanahan.

A tract of 28 acres in the possession of R. J. Garrett.
A tract of 100 acres in the possession of Rob't Smith.
A tract of 84 acres in the possession of —— Adams.
A tract of 100 acres in the possession of J. W. Garrison.
A tract of 50 acres in the possession of W. D. Barton.
A tract of 140 acres in the possession of John Yates.
A tract of 100 acres in the possession of L. D. Forbes.
A tract of 50 acres in the possession of Abe Terry.

EXHIBIT B.

An undivided two-thirds interest in a tract of land described as follows: Beginning at the N. E. corner of a tract of 80 acres known as the Williams tract on Big Sandy creek; thence up Big Sandy creek with its meanders to Lane's line; thence S. 71 W. to the line of B. Coon's survey; thence S. with Coon's line to his S. E. corner; thence W. with Coon's line 950 v's to his S. W. corner; thence S. 28 E. 237 v's to the S. E. corner of Austin Robinson's tract; thence S. 62 W. with the line of said tract 169 v's to a stake: thence S. 45 E. 350 v's to a stake from which a post oak marked P. bears N. 60 E. 11 v's; thence S. 47 E. 41 v's to a stake; thence N. 45 E. 635 v's to a stake from which a post oak marked V bears N. 35 E. 44 v's; thence S. 45 E. to the N. W. corner of Williams tract; thence N. 62 E. with the N. line of said Williams tract to the place of beginning.

48 EXHIBIT C.

An undivided two-thirds interest in a tract of land described as follows: Beginning of on the W. bank of the Brazos river at the N.

E. corner of Ruble's 200-acre tract in the S. E. corner of the Pedro Zarza 4-league tract; thence S. 60 W. with Ruble's N. line 2,040 v's to his N. W. corner; thence S. 30 E. with his W. line 436 v's to the S. line of the Ruble half league; thence S. 60 W. with s'd line 2,491 v's to the S. E. corner of the Ruble 634-acre tract; thence with the E. line of said tract N. 30 W. 1243 v's to his N. E. corner; thence S. 60 W. with his N. line 3,001 v's to his N. W. corner; thence S. 30 E. with his W. line 1,083 v's; thence S. 60 W. 1,042 v's to the S. E. corner of Ruble's 143-acre tract; thence N. 30 W. with his E. line 1,083 v's to his N. E. corner; thence S. 60 W. with his N. line 747 v's to his N. W. corner; thence S. 30 E. with his W. line 1,083 v's to his S. W. corner; thence N. 60 E. with his S. line to E. line of Zarza tract; thence S. 28 E. with s'd E. line to Cow Bayou; thence up s'd Bayou with its meanders to the S. E. corner of the W. G. Etheridge 105-acre tract; thence N. 4½ W. with the E. line of said tract to its N. E. corner; thence S. 86½ W. with the N. line of said tract 730 v's to its N. W. corner; thence S. 4½ E. with the W. line of said tract 268 v's to the N. E. corner of P. Kersey's 100-acre tract; thence S. 86½ W. with
Kersey's N. line 983 v's to his N. W. corner; thence S. 24
49 E. with his W. line 775 v's to his S. W. corner on Cow bayou;
thence down s'd bayou to the N. W. corner of Polly Myers' 100-acre tract; thence S. 15 E. with her W. line 995 v's to the N. E. corner of F. E. Hendrick's 35-acre tract; thence S. 75 W. with the N. line of s'd tract 330 v's to its N. W. corner; thence S. 15 E. with the N. line of said tract 598 v's to its S. W. corner; thence N. 75 E. with the S. line of s'd tract 330 v's to its S. E. corner; thence N. 15 W. with the E. line of s'd tract 553 v's to the S. W. corner of the Polly Myers 100-acre tract; thence N. 75 E. 574 v's to her S. E. corner; thence N. 15 E. with her E. line 340 v's to B. F. & S. Kersey's S. W. corner; thence N. 88 E. with Kersey's S line 1,425 v's to their S. E. corner; thence N. 28 W. with their E. line 847 v's to Cow bayou; thence down Cow bayou to the E. line of the Zarza tract; thence S. 28 E. with s'd line & E. line of the Aguire league to the S. E. corner of the said Aguirre league; thence S. 62 W. with S. line of s'd Aguirre, about 3,000 v's, to the S. E. corner of the Featherstone 220-acre tract; thence N. 10 E. with his E. line 1023 v's to his N. E. corner; thence S. 84½ W. with his N. line to the S. E. corner of the E. J. Featherstone 74-acre tract; thence N. 21½ W. with s'd Featherstone's E. line 820 v's to his N. E. corner; thence S. 68½ W. with his N. line 600 v's to his N. W. corner; thence S. 21½ E. with his W.
line to his S. W. corner; thence W. with Geo. Featherston's
50 N. line 165 v's to his N. W. corner on Mill branch; thence
down s'd branch to the S. line of the said Aguirre league; thence S. 62 W. with s'd line, about 5,945 v's, to the S. W. corner of s'd league; thence N. 28 W. with the W. line of s'd league & Zarza league, about 3,600 v's, to the S. W. corner of J. T. Bowman's tract; thence N. 62 E. with his S. line 1,134 v's to the W. line of Brandon 186-acre tract; thence S. 28 E. with Brandon W. line to the S. W. corner; thence N. 62 E. with Brandon's, Martin's, & Talley's lines 1,087 v's to a branch; thence down s'd branch to Talley's lower corner on same; thence N. 62 E. with Talley's S. line 590 v's to his S. E.

corner; thence N. 1½ E. with his E. line 640 v's to his N. E. corner; thence S. 62 W. with his N. line 960 v's to the E. line of Martin's tract; thence N. 1½ E. with Martin's E. line 1,424 v's to Cow bayou; thence down Cow bayou to the W. line of Mrs. Jackson's 640-acre tract; thence S. 30 E. with her line 1,870 — to her S. W. corner; thence N. 60 E. with he- S. line to W. line of Dr. Featherston- 115-acre tract; thence S. 15 E. with his W. line 490 v's; thence S. 42 E. 700 v's to his S. corner; thence 48 E. 430 v's to his S. E. corner; thence N. 12 W. with his E. line 915 v's to the S. line of Mrs. Jackson's 640-acre tract; thence N. 60 E. with s'd S. line, about 150 v's to the S. E. corner; thence N. 30 W. with the east line of s'd tract 1,900
51 v's to the N. E. corner of the same; thence S. 60 W. with N. line of said tract 1,290 v's to the S. E. corner of Morris' 100-acre tract; thence N. 4½ W. with his E. line 840 v's to the N. E. corner of the same; thence S. 62 W. with his N. line to the N. E. corner of Wiggins' 100-acre tract; thence N. 4½ W. with G. W. Bowman's E. line 812 v's to his N. E. corner; thence S. 86½ W. with Bowman's N. line 1,512 v's to corner in Jones' E. line; thence N. 4½ W. 550 v's to Jones' N. E. corner; thence S. 72½ W. with Jones' N. line 470 v's to Russell's S. E. corner; thence N. 17½ W. 640 v's to Russell's N. E. corner; thence N. 75 W. 199 v's to the S. E. corner of school lot; thence N. 15 E. 174 v's to Caraway's S. line; thence S. 75 E. 105 v's to Caraway's S. E. corner; thence N. 15 E. with his S. line 607 v's to DeGraffenreid- S. W. corner; thence S. 75 E. 102 v's to his S. E. corner; thence N. 15 E. with his E. line 773 v's to his N. E. corner; thence N. 15 W. with Deering's line 300 v's; thence N. 52 E. with Deering's S. line 810 v's to his S. E. corner; thence N. 28 W. with his E. line 982 v's to his N. E. corner; thence S. 62 W. with his N. line 880 v's; thence N. 30 E. 30 v's to corner of Deering- 265-acre tract; thence N. with his E. line 533 v's to the N. line of
52 the Zarza grant; thence N. 62 E. with said N. line about 4,000 v's to the N. W. corner of the Wooley 250-acre survey; thence S. 28 E. with his W. line 800 v's to his S. W. corner; thence N. 62 E. with his S. line 1,764 v's to his S. E. corner; thence N. 28 W. about 400 v's to Duty's N. W. corner; thence S. 39 E. with Duty and Westbrook's W. line 1,850 v's to Westbrook's S. corner; thence N. 51 E. with his S. E. line 1,170 v's to his E. corner; thence N. 39 W. with his line 796 v's to Duty's S. E. line; thence with s'd line N. 51 E. to his N. E. corner; thence N. 39 W. to Dr. Miller's S. W. corner; thence N. 62 E. with Miller's S. line 425 v's to his S. E. corner; thence N. 28 W. with Miller's E. line 700 v's [to] the N. line of the Zarza grant; thence N. 62 E. with s'd line about 2,200 v's to Buck Jackson's N. W. corner; thence S. 28 E. with his W. line 920 v's to his S. W. corner; thence N. 62 E. with his S. line 920 v's to his S. E. corner; thence N. 28 W. with his E. line 920 v's to the N. line of the Zarza grant; thence N. 62 E. with said Zarza line about 1,525 v's to the N. W. corner of Gaines' 150-acre tract; thence S. 28 E. with Gaines' W. line 786 v's to his S. W. corner; thence N. 62 E. with his S. line 723 v's to his lower corner on the Brazos river; thence down the said river with its meanders to the place of beginning;

the State of Massachusetts, and appearing in court as a party therein says that plaintiffs petition is not sufficient in law, and of this he prays the judgment of the court.

He says that it is apparent on the face of the plaintiffs' peti-
59 tion that there is a non-joinder of parties necessary to the determination of this suit, and of this he prays the judgment of the court. He says that at the death of Edward Hanrick, the intestate, in the State of Alabama in 1865, that Elizabeth O'Brien, the sister of deceased, and John and James Hanrick, the brothers of the deceased, and Edward G. Hanrick, defendant herein, were the only heirs-at-law of the said intestate, and became each the owner of an undivided one-fourth interest in the lands involved in this suit and set out in plaintiffs' petition; that neither James Hanrick nor John Hanrick, nor their heirs-at-law or assigns, nor either any of them, are parties herein, and of this he prays the judgment of the court. He denies all and singular the allegations in plaintiffs' petition contained, and says that he is not guilty of the several tresspasses laid to his charge, nor any or either of them. He avers that said Elizabeth O'Brien, John and James Hanrick, on the 16th day of May, 1870, made, executed, and delivered to one Philip O'Brien their certain power of attorney, authorizing and empowering said Philip

O'Brien to sell and convey their said interest in the several
60 shares of the estate of said Edward Hanrick, and coupled said power of attorney with an interest in the said estate.

That on the 14th day of February, 1878, said Philip O'Brien, in consideration of one thousand dollars to him paid by John B. Sargent, made, executed, and delivered to the said John B. Sargent a deed with full covenants of warranty to one undivided one-half of the shares belonging to the said Elizabeth O'Brien, John & James Hanrick, as the attorney-in-fact of the said Elizabeth O'Brien and John and James Hanrick, and as the agent of his wife, Eliza M. O'Brien, and himself. That said deed was made and executed and delivered in good faith for a valuable consideration paid without any notice.

And the said John B. Sargent avers that at the time of making and delivery of the said deed dated on the 14th day of February, 1878, the said Philip O'Brien agreed and undertook to cure any defect in the power of attorney and the title conveyed thereunder, if any existed, which is denied, and in pursuance of such agreement obtained conveyances from all parties in interest to be made to his wife, Eliza M. O'Brien, plaintiff herein. That said Philip O'Brien taking by purchase and taking the deeds in the name of his wife the title therein conveyed inured directly to the benefit of the purchaser, the said John B. Sargent.

61 The said John B. Sargent therefore prays that he have judgment establishing his right to the share of the lands described and set out in plaintiffs' petition, and that he have a judgment and decree against all parties to said suit for partition, and that he have the same adjudged to him, set apart, and allot-ed to him in severalty, and for all cost & general relief.

F. BARNARD,
Att'y Att'y *for J. B. Sargent.*

62 And afterwards, to wit, on April, 4th, 1883, being on the same day, the following answer to petition for leave to intervene was filed, endorsed, to wit:

No. 14. Eliza M. O'Brien *et al. vs.* Edward G. Hanrick. Answer to petition for leave to intervene. Filed April 4th, 1883. J. H. Finks, clerk.

Which is in words following:

Answer to Petition for Leave to Intervene.

U. S. Circuit Court at Waco, Texas.

ELIZA M. O'BRIEN *et al.*
vs.
ED. G. HANRICK. } No. 14.

And now come plaintiffs in the above-entitled cause, and excepting to the petition filed by John B. Sargent and Wharton Branch asking for leave to intervene, say the same is insufficient in law for the following reasons, to wit:

1st. Because said petition does not state the residence and citizenship of all the parties to this suit at the time of filing the same, nor does it appear therefrom that this court would have jurisdiction were said Branch and Sargent or either of them permitted to intervene herein.

63 2. Because it does appear from said petition that Wharton Branch is seeking in this suit to recover a judgment for an interest in said lands against the defendant, Ed. G. Hanrick, and that both the said Branch and the said Hanrick reside in the State of Texas and are both citizens of said State.

Because said petition presents no reason founded in law why said Branch and Sargent should be permitted to intervene.

And for further reason why leave to intervene on the part of said Branch and Sargent should not be granted, plaintiffs say that at the time of filing the same the said Sargent, who is seeking in this suit to recover a judgment against the Eliza M. O'Brien and husband, resides in and is a citizen of the same county and State of which they are resident citizens, to wit, the county of Suffolk, State of Massachusetts.

And plaintiff- further say that the consideration of said deeds under which said Branch & Sargent claim title to an undivided interest in said lands have wholly failed; that no considera-

64 tion was, in fact, ever paid for the execution of the same, and that the same was obtained by a fraudulent combination between the said Branch & Sargent; that a suit is now pending in the district court of Galveston county, State of Texas, between plaintiffs and said Branch and Sargent for the cancellation of the same, on the ground, among other things, of the failure of said consideration; that plaintiffs have a perfect, equitable defense against the claim of an interest in said lands under and by virtue of said conveyances, and that to permit the said Branch & Sargent to assert an interest

the State of Massachusetts, and appearing in court as a party therein says that plaintiffs petition is not sufficient in law, and of this he prays the judgment of the court.

He says that it is apparent on the face of the plaintiffs' petition that there is a non-joinder of parties necessary to the determination of this suit, and of this he prays the judgment of the court. He says that at the death of Edward Hanrick, the intestate, in the State of Alabama in 1865, that Elizabeth O'Brien, the sister of deceased, and John and James Hanrick, the brothers of the deceased, and Edward G. Hanrick, defendant herein, were the only heirs-at-law of the said intestate, and became each the owner of an undivided one-fourth interest in the lands involved in this suit and set out in plaintiffs' petition; that neither James Hanrick nor John Hanrick, nor their heirs-at-law or assigns, nor either any of them, are parties herein, and of this he prays the judgment of the court. He denies all and singular the allegations in plaintiffs' petition contained, and says that he is not guilty of the several tresspasses laid to his charge, nor any or either of them. He avers that said Elizabeth O'Brien, John and James Hanrick, on the 16th day of May, 1870, made, executed, and delivered to one Philip O'Brien their certain power of attorney, authorizing and empowering said Philip O'Brien to sell and convey their said interest in the several shares of the estate of said Edward Hanrick, and coupled said power of attorney with an interest in the said estate.

That on the 14th day of February, 1878, said Philip O'Brien, in consideration of one thousand dollars to him paid by John B. Sargent, made, executed, and delivered to the said John B. Sargent a deed with full covenants of warranty to one undivided one-half of the shares belonging to the said Elizabeth O'Brien, John & James Hanrick, as the attorney-in-fact of the said Elizabeth O'Brien and John and James Hanrick, and as the agent of his wife, Eliza M. O'Brien, and himself. That said deed was made and executed and delivered in good faith for a valuable consideration paid without any notice.

And the said John B. Sargent avers that at the time of making and delivery of the said deed dated on the 14th day of February, 1878, the said Philip O'Brien agreed and undertook to cure any defect in the power of attorney and the title conveyed thereunder, if any existed, which is denied, and in pursuance of such agreement obtained conveyances from all parties in interest to be made to his wife, Eliza M. O'Brien, plaintiff herein. That said Philip O'Brien taking by purchase and taking the deeds in the name of his wife the title therein conveyed inured directly to the benefit of the purchaser, the said John B. Sargent.

The said John B. Sargent therefore prays that he have judgment establishing his right to the share of the lands described and set out in plaintiffs' petition, and that he have a judgment and decree against all parties to said suit for partition, and that he have the same adjudged to him, set apart, and allot-ed to him in severalty, and for all cost & general relief.

F. BARNARD,
Att'y Att'y *for J. B. Sargent.*

62 And afterwards, to wit, on April, 4th, 1883, being on the same day, the following answer to petition for leave to intervene was filed, endorsed, to wit:

No. 14. Eliza M. O'Brien *et al. vs.* Edward G. Hanrick. Answer to petition for leave to intervene. Filed April 4th, 1883. J. H. Finks, clerk.

Which is in words following:

Answer to Petition for Leave to Intervene.

U. S. Circuit Court at Waco, Texas.

ELIZA M. O'BRIEN *et al.*
vs.
ED. G. HANRICK. } No. 14.

And now come plaintiffs in the above-entitled cause, and excepting to the petition filed by John B. Sargent and Wharton Branch asking for leave to intervene, say the same is insufficient in law for the following reasons, to wit:

1st. Because said petition does not state the residence and citizenship of all the parties to this suit at the time of filing the same, nor does it appear therefrom that this court would have jurisdiction were said Branch and Sargent or either of them permitted to intervene herein.

63 2. Because it does appear from said petition that Wharton Branch is seeking in this suit to recover a judgment for an interest in said lands against the defendant, Ed. G. Hanrick, and that both the said Branch and the said Hanrick reside in the State of Texas and are both citizens of said State.

Because said petition presents no reason founded in law why said Branch and Sargent should be permitted to intervene.

And for further reason why leave to intervene on the part of said Branch and Sargent should not be granted, plaintiffs say that at the time of filing the same the said Sargent, who is seeking in this suit to recover a judgment against the Eliza M. O'Brien and husband, resides in and is a citizen of the same county and State of which they are resident citizens, to wit, the county of Suffolk, State of Massachusetts.

And plaintiff- further say that the consideration of said deeds under which said Branch & Sargent claim title to an undivided interest in said lands have wholly failed; that no consideration was, in fact, ever paid for the execution of the same, and that the same was obtained by a fraudulent combination between the said Branch & Sargent; that a suit is now pending in the district court of Galveston county, State of Texas, between plaintiffs and said Branch and Sargent for the cancellation of the same, on the ground, among other things, of the failure of said consideration; that plaintiffs have a perfect, equitable defense against the claim of an interest in said lands under and by virtue of said conveyances, and that to permit the said Branch & Sargent to assert an interest

64

therein in this suit and court by virtue of said conveyances would result in great injury & hardship to plaintiffs, thereby by depriving them of an equitable defense.

That plaintiffs cannot sue out an injunction against the said Branch & Sargent setting up the facts stated above in relation to said conveyances without being greatly delayed and retarded in the progress of this cause, they being now prepared to answer ready for trial, and that leave to intervene at the present time cannot
65 be justly granted the said Branch & Sargent without necessitating the suing out of such injunction by plaintiffs and then retarding this cause, and that, therefore, said petition is filed only.

The premises considered, plaintiffs pray that leave to intervene be denied and said petition be struck out.

BRADY & RING,
Att'ys for Pl't'ffs'.

And now comes H. F. Ring, and, being duly sworn, says the facts set forth herein are true, according to the best of his knowledge and belief.

H. F. RING.

Signed and sworn to before me, this the 4th April, A. D. 1883. Witness my hand and seal.

[L. S.] J. H. FINKS, *Clerk.*

66 And afterwards, on, to wit, April 5th, 1883, plaintiffs' first supplemental petition was filed, endorsed, to wit:

No. 14. U. S. cir. court at Waco. Eliza M. O'Brien *et al. vs.* Edward G. Hanricks. Plaintiffs' first supplemental petition. Filed April 5th, 1883. J. H. Finks, clerk.

Which is in words following:

Plaintiffs' First Supplemental Petition.

In Circuit Court of the United States for the Northern Dist. of Texas, at Waco.

ELIZA M. O'BRIEN *et al.*
vs.
EDWARD G. HANRICK. } No. 14.

And now comes plaintiff- in the above-entitled cause, and, with leave of the court first had and obtained, file this their first supplemental petition, and excepting to said so-styled "motion for leave to intervene" and said so-styled "answer," respectively filed by the said John B. Sargent and Wharton Branch, say the same are
67 insufficient in law, for the following reasons, to wit:

1. Because the same present no cause of action against plaintiffs.

2. Because the same presents no cause of action against defendants, and which said exceptions plaintiffs pray judgment of the court; and answering said pleadings further plaintiffs deny all and

singular the allegations in said so-styled "answers" filed by the said Sargent and Branch, except wherein the truth of the same is hereinafter expressly admitted, and call for strict proof of said allegation.

And for further answer, pleading, plaintiffs say that said conveyances to the said Branch & Sargent, which were executed by virtue of said power of attorney, are null and void, because the considerations for which the same were executed were unauthorized by the terms of said power, and because the execution of the same were procured by fraud and artifices practiced by the said Branch & Sargent on the said O'Brien and his said principals.

SEC. 1. And, answering further, plaintiffs say that on, to
68 wit, the —— day of ———, A. D. 1870, the said Eliza O'Brien, of Ireland, and the said John and James Hanrick executed and delivered to said Philip O'Brien said power of attorney, then making the said Philip their true and lawful agent and attorney in fact, he being therein authorized and empowered, among other things, to institute all necessary legal proceedings against the said Edward G. Hanrick and all other persons unlawfully claiming an interest in said lands against his principals, and in their names and for their use and benefit to sell and convey their said interest in said lands.

SEC. 2. That at the time of the execution of said power the said Edward G. Hanrick was the only heir of the said deceased Edward residing in the State of Texas, and that he was then holding out and representing to the world at large that there were no heirs or parties entitled to an interest in said estate besides himself; and he did then deny, and has continuously therefrom down to the present time denied, the right of all other heirs of the said deceased
69 Edward to participate in the enjoyment of the latter's estate or any portion thereof.

SEC. 3. That during the year 1877 and the early part of the year 1878 the said Philip O'Brien, he residing then in Boston, Mass., was substantially informed by letters written by the defendant, Wharton Branch, the latter being an attorney and counsellor-at-law in the city of Galveston, that he, the said Branch, had been associated with one Wm. G. Hale, deceased, in the prosecution of suits in behalf of the said deceased Edward during the latter's lifetime, against numerous parties claiming under adverse title portions of the lands described in said Exhibit A, hereto attached and made a part of this petition, the said William G. Hale being the deceased Edward's trusted friend and lifelong legal adviser, and that he, the said Branch, had succeeded, on the death of said Hale, to the latter's legal business in great part, and that for this reason he, Branch, felt it to be his duty to look up the heirs of the said deceased Edward and inform them of their legal rights in and to said estate;
70 that he, Branch, had in his possession most of the papers of the said Hale, including numerous memoranda made by the latter of points of law and fact relating to said estate, and that on account of these peculiar advantages and of his special knowledge of the facts of the case and of the laws appertaining thereto, he was

free to say that he could serve the said Philip in the premises more effectually than any one else.

And the said Wharton Branch, being informed that the said Philip and his said principals, on account of their poverty, were unable to institute legal proceedings for the establishment of their interests in said estate, did further state substantially in said correspondence that if the said Philip would convey to him an interest in said lands he, the said Branch, would raise the money with which to institute and prosecute all necessary legal proceedings in relation thereto, and did further state that he would also, after the execution of said con-
71 veyances, advance and extend to the said Philip a loan or loans of money for the said Philip's personal use and benefit, and he, Branch, did earnestly and repeatedly request the latter in said correspondence to come to the city of Galveston without delay and see him, Branch, and did promise and agree that if he would execute such said conveyances and send the same to him he would immediately remit to him, Philip, two hundred and fifty dollars to pay his, Philip's, expenses to Galveston; and did further earnestly exhort the said Philip to take immediate steps for the recovery of said lands, and did represent that there was a pressing necessity for such immediate action on his part for that a considerable portion of the lands appertaining to said estate were going to waste for want of attention, and that a decree adverse to the estate of the said deceased Edward had been very recently rendered in the United States
72 Supreme Court which, if not at once attended to in behalf of the non-resident heirs of Edward Hanrick, deceased, would result in the loss to them of their interest in the entire La Serda grant described in Exhibit A.

SEC. 14. That in the early part of the year 1878, or thereabouts, the said Philip showed said correspondence to the defendant, John B. Sargent, of the city of Boston, Mass., and the latter, on learning of the inability of said non-resident heirs to prosecute their claim to an interest in said lands on account of poverty, proposed to become interested in the matter himself, and to assist the said Philip pecuniarily and otherwise in the establishment of the said rights of said non-resident heirs, in consideration of the said Philip giving him, Sargent, an interest in said lands, and did also offer to pay the said Philip's expenses to Galveston and to accompany him there in accordance with Branch's said request.

SEC. 5. And it was thereupon agreed by and between the said Philip O'Brien, John B. Sargent, and one William Jenkins
73 that the three following-described conveyances should be executed:

First. That the said Eliza O'Brien, of Ireland, by her agent, the said Philip, should convey to the said Jenkins all her interest in said estate and lands in Texas.

Second. The said Jenkins should then immediately convey to the said Eliza M. O'Brien, wife of said Philip, all the interest in said estate and lands acquired by him, the said Jenkins, by virtue of the conveyances referred to next above.

Third. The said Eliza M. O'Brien, wife of said Philip, should then

convey to the defendant, Sargent, one-half of the undivided interest in said lands acquired by her by virtue of said conveyances referred to next above.

It was also then and there agreed by said parties that the first and second of said conveyances should be without good or valuable consideration, and that the consideration of the last-named of the same, to wit, said conveyance to Sargent, should be an agreement on the part of the said Sargent to furnish all the money nec-
74 essary for establishing by legal proceedings the interest of the said Eliza M. O'Brien in and to said land, and also to furnish board and lodging for the said Philip and his wife during the pendency of said litigation without reimbursement till the same should be settled.

SEC. 6. And in pursuance of this agreement the said Philip, as agent as aforesaid, did, on the 1st day of February, A. D. 1878, execute and deliver to the said Jenkins the instrument of conveyance described substantially in Exhibit O, hereto attached and made a part of this petition, wherein, in consideration, apparently, of the sum of one dollar and other valuable considerations, he conveyed to him, Jenkins, all the interest of his principal, the said Eliza O'Brien, of Ireland, in and to said estate and lands. And on or about the same day also the said Jenkins conveyed to the said Eliza M. O'Brien, wife of Philip O'Brien, by deed of conveyance on its face, apparently for valuable considerations, all the interest in said estate and lands conveyed to him by the said Eliza O'Brien, of Ireland, by her agent, the said Philip, and said Eliza M.
75 O'Brien, wife of said Philip, did also, on or about said day last named, convey to the said Sargent, by deed of conveyance on its face, purporting to be in consideration of valuable considerations, one-half of the undivided interest in said estate and lands which she had acquired by virtue of the conveyance referred to next above, the consideration of said conveyance to the said Sargent being the promise then & there made by him that he would advance all the money necessary for establishing in the courts of the country the legal rights of the said Eliza in and to said lands and pay all expenses incidental thereto, including all attorneys' fees and costs of court, and also that he would, pending said anticipated litigation, give the said Philip and his wife a home in his house, free of charge, there being, in truth and fact, no consideration in money, either given or promised, any of the parties to said three conveyances referred to next above or any other consideration than that next above mentioned.

SEC. 7. And accordingly, soon thereafter the said Philip and Sargent, for the purpose of carrying out said agreement referred
76 to next above, visited the said Branch in the city of Galveston, Texas.

That on their arrival there the said Branch informed them that said apparent conveyance from the said Eliza O'Brien, of Ireland, by her agent, the said Philip, to the said Jenkins was void, for the reason that the same was unauthorized by the terms of said power of attorney, which representations were relied upon and acquiesced

in by the said Philip & Sargent; and it was thereupon understood and agreed upon by the said Philip and the said Sargent and the said Branch that the contract made with the said Sargent, referred to next above, was void, and should be abandoned, and that a new contract between the said Eliza O'Brien, of Ireland, by her agent, the said Philip, and the said Branch and Sargent should then and there be entered into for the purpose of recovering said interest in said lands, which was accordingly done as hereinafter shown; and the said Branch then and there suggested that in order to avoid any embarrassment which might possibly subsequently arise on
77 account of the execution of said three instruments of conveyance referred to next above that the same should be marked cancelled, in which suggestion the said Philip and Sargent acqui-*esed*, and the same were then and there marked cancelled, and considered by the said Philip and Sargent and Branch null & void, and declared by them [of] no further force or effect.

SEC. 8. And the said Philip then and there believing all of said representations on the part of Branch as hereinbefore detailed to be true, and relying on the same, and relying particularly on said representations in regard to his having been an associated counsel with the said Hale in said suits, and of his having succeeded to the greater part of said Hale's legal business, and having thus been induced to repose great confidence in the integrity and ability of the said Branch, and for the reason above stated actually reposing such confidence in him, the said Philip, did rely without suspicion on the advice of the said Branch, then and there given him, in regard to the form and terms of the said contract hereinafter shown to
78 have been then and there entered into, the said Branch then and there professing to act, and, in fact, acting as the legal and confidential adviser of the said Philip and his principal in the premises.

SEC. 9. And accordingly the said Branch and Sargent then and there promised the said O'Brien that if he would execute in their favor the instruments, copies of which in substance are hereto attached and marked, respectively, Exhibits X & Y and made a part of this petition, that they, the said Branch and Sargent, would themselves advance all the money necessary for paying costs of court, lawyers' fees, and all incidental expenses connected with the establishment of the said Eliza O'Brien's title and interest in said lands. And the said John B. Sargent then and there, and before the signing of said instruments, specially took it upon himself and promised, as his share of the performance of said agreement, that he, individually, in behalf of the said Eliza O'Brien, of Ireland, or in behalf of any person to whom she might assign her interest, would advance all the money necessary for the purpose of instituting and
79 carrying on said legal proceedings from time to time as the same should be required, of all of which promises on the part of Sargent the said Branch had full knowledge and in which he then and there acquiesced, and the said Sargent did also then and there promise, in addition that he would board the said O'Brien and his wife at his, the said Sargent's, house in Boston, or provide

for them suitable board pending said anticipated litigation, without reimbursement, until the termination of the same, of which promise also the said Branch was then and there fully informed and in which he acquiesced.

SEC. 10. And the said Branch then and there, and before the signing of said instruments, took it specially upon himself and promised as his share of said agreement that he, individually, would give to the anticipated legal proceedings his personal legal services, and would at his own expense employ other counsel to assist him in the same, and that he would immediately on the signing of said instruments take all necessary legal steps against the said Edward G. Hanrick and other essential parties for the purpose of es-
80 tablishing the right and title of the said Eliza in and to said lands for her benefit or for the benefit of any person to whom she might assign her interests.

SEC. 11. And for the purpose of more equitably adjusting between themselves, Branch, and Sargent the burden of said considerations to be borne by each, respectively, the said Sargent did then and there, and at the time of signing said instruments described in said Exhibits X & Y, execute in favor of the said Branch and deliver to him the instrument, a copy of which, in substance, is set forth in Exhibit W, hereto attached and made a part of this petition, wherein the said Sargent conveyed to the said Branch one-half of the undivided interest in said estate apparently conveyed to him by the said Philip in said instrument described in said Exhibit X, the only consideration of said deed from Sargent to Branch being, as before stated, the agreement on the part of Branch to furnish at his own expense the necessary legal counsel.

SEC. 12. And the said Branch did then and there, and before, and at the time of the signing of said three instruments described in said Exhibits W, X, & Y, represent unto the said Philip that
81 he was perfectly familiar with the titles of the lands appertaining to said estate and of the condition and value of the same, and that all of said lands were then in litigation, and had been in litigation continuously from and anterior to the death of the said Edward Hanrick down to the time of signing said instruments in favor of Branch and Sargent, and that at the time, to wit, the time last referred to, no portion of said estate of any considerable extent was free from litigation, all the titles to the same, including the lands described in said Exhibit A, of which the said Edward, deceased, died seized, being of doubtful validity, and all being then at that very time seriously contested in the courts of the country by adverse claimants thereto; and, as a predicate in support of the apparent truthfulness of these representations in regard to the condition of the titles to said lands, the said Branch did theretofore, to wit, on the — day of ——. A. D. 1877, write to J. D. McClelland, Esq., of New York, he, McClelland, then being said Philip's legal adviser, stating that he would buy out the interest of the non-
82 resident heirs of Edward Hanrick, deceased, including that of the said Eliza, of Ireland, if they could satisfactorily establish their relationship to the said deceased; and that afterwards, to

wit, on the — day of ——, 1877, the said Branch again wrote to the said McClelland, stating that since he had offered to buy out said heirs a certain adverse decision rendered against said estate by which the eleven leagues of land granted to La Serda, and described in Exhibit A, had been lost to the estate, had determined him against so doing; but that he was still willing to "law it out" for them so long as there was "a plank left to stand on," both of which letters were shown the said Philip shortly after the receipt of the same; and thus the said Branch did represent unto said Philip that on account of the doubtful validity of the titles in Edward Hanrick, deceased, as well as the doubt and difficuly of establishing the right and title of the said Eliza O'Brien in and to the same, a conveyance of an undivided three-fourths of her said interest in said estate was not, under the circumstances, an excessive or inequitable consideration.

83 SEC. 13. And the said Wharton Branch did also, then and there, represent the necessity of taking immediate action in the matter of said legal proceedings, there being, according to his representations, great danger *off* the said Edward G. Hanrick selling of the lands of said estate at probate sale, and thus placing the same beyond the reach of said non-resident heirs.

SEC. 14. And said Wharton Branch did, then and there, further represent and advise that he, the said Philip, was fully authorized by the terms of said power of attorney to execute conveyances transferring his principal's interest in said lands for the consideration hereinbefore shown to have been promised by the said Wharton Branch, in reference to said instruments described in Exhibits X & Y, and did professionally advise him, Philip, to this effect.

SEC. 15. Of all of which representations, hereinbefore shown to have been made then and there, and previously thereto, by the said Branch to the said Philip, in references to the matter hereinbefore set forth, the said Sargent was fully informed, and in which he acquiesced; and he, Sargent, did join the said Branch in advising and persuading the said Philip to execute said conveyances for the purposes and considerations aforesaid, and did also, then &

84 there, join the said Branch, in urging him to act in the said premises immediately, and without further delay or investigation, on account of the losses which such delay might thereby occasion according to Branch's said representations.

SEC. 16. And accordingly the said Philip O'Brien then and there believing all of said representations made by Branch to be true, and relying on the truthfulness of the same, and having no knowledge to the contrary, and relying on the good faith of the said Branch and Sargent toward him and his principals — they, Branch and Sargent, then and there professing to act and in fact acting as the agents and confidential advisers of the said Philip and of the said Eliza of Ireland and the said Branch then and there, with the knowledge and acquiescence of the said Sargent, professing to be, and in fact being, the legal advisers of the said Philip, the latter expressed a willingness in consideration of said promises made by Branch and Sargent to sign and acknowledge said instruments set forth in said Exhibits X and Y, provided the same should

85 not take effect as deeds, or be recorded or otherwise used as such until the said Branch and Sargent had evinced a disposition to comply in good faith with their said promises by the institution of said legal proceedings and the vigorous prosecution of the same; and thereupon the said Branch proposed that the said Philip should sign and acknowledge said instruments and place them in his, Branch's, hands, with the understanding that they should not be recorded or take effect as deeds, or be in any way used as such, until the said Sargent should remit to him, Branch, money enough to institute all necessary suits or other legal proceedings against the said Edward G. Hanrick and all other necessary parties, nor until such suits or legal proceedings were actually instituted; the said Branch then and there agreeing that if the said Philip would do so he, Branch, would not record said deeds, or permit the same to be recorded, or make, or permit to be made, any use of the same as deeds till said Sargent should send him, Branch, money enough to institute and vigorously prosecute said legal proceedings, nor until the same should be in fact instituted and under legal headway; the said Branch then and there agreeing with, and representing to, the said Philip that said in-

86 struments should and would have no effect as deeds until the said Sargent should remit said money as aforesaid, and said legal proceedings should be instituted, of which representations and promises, on the part of Branch, the said Sargent was fully informed and in which he joined and consented; nor did the said Branch inform the said Philip that the instrument which he proposed to sign in his, Branch's, favor ought to be deposited with some other person than himself, in order to have the effect only of an escrow, but, being then and there the said Philip's confidential and legal adviser, he, the said Branch, represented to the former, and induced him to believe, and he actually did then and there believe, that said instruments would have no effect as deeds, or vest any title in either Branch or Sargent, until said considerations were fulfilled; and so the said Philip did, on or about the 15th day of February, 1878, sign and acknowledge said instrument-, and place them in Branch's hands for the purposes aforesaid on said representations; nor was said instrument, in favor of Sargent, referred to next above, ever delivered by the said Philip to Sargent; nor did he, the said Philip, ever authorize any one to deliver the same to Sargent or to place the same on record.

87 SEC. 17. And all of said three instruments described in said Exhibits W, X, and Y were drawn up and were signed by the said Philip and Sargent, respectively, at the same time and place, and did in fact constitute one and the same transaction, and were intended and supposed by the said Philip to constitute one and the same contract, to wit, a contract between himself as the agent of Eliza O'Brien on the one hand, and Branch and Sargent on the other hand, it being his intention that the said Branch and Sargent should be jointly bound to carry out the entire agreements which, as between themselves, each had respectively agreed to execute as aforesaid. The making of said three apparent deeds instead of one in-

strument embracing all the terms of said contract having been suggested then and there by the said Branch, said instrument then and there having been actually drafted by him, and he, the said Branch, then and there professing to act, and in fact acting, as the legal counsellor and confidential adviser of the said Philip and his
88 principal in relation to the subject-matter of said contract, and the said Sargent also then and there acting in said premises as their agent and confidential adviser. And the said Branch and Sargent were then and there fully informed of the fact, the same being in truth a fact, that the said Philip O'Brien and his principals were utterly unable, on account of poverty, to furnish any money necessary to carry on said litigation, and that they themselves, the said Branch and Sargent, or either of them, must furnish the same, and it was then and there fully understood and agreed upon and consented to and acquiesced in jointly by the said Sargent and Branch, and between them and the said O'Brien, that said legal proceedings were to be vigorously prosecuted without delay, and that under no circumstances was the said Philip O'Brien or his principals to be called upon to furnish any portion of the expenses incidental thereto, and that this was the principal consideration which moved the said Philip, agent as aforesaid, to act in said premises.

Sec. 18. Nor was any money ever paid or promised to the said Philip or to his principal as the consideration or any part of
89 the same for which said instruments were signed and acknowledged and delivered to Branch as aforesaid, but said contract was entered into without any money being actually paid or promised by either of the parties to the same as the consideration or part of the consideration thereof.

Sec. 19. That at the time of signing said three instruments set forth in said Exhibits W, X, and Y, the said John and James Hanrick were dead, as hereinbefore stated, of which fact the said Branch and Sargent were fully informed, as well of the fact, which was a fact, that a considerable portion of the lands appertaining to said estate were then in litigation, the titles to a portion of the same, of which the said Edward, deceased, died seized, being of a doubtful validity; but said Branch, with the knowledge and consent of Sargent, represented to the said Philip that in order for him to convey that portion of his principal's undivided interest, which he did in fact intend to convey to them, to wit, an undivided three-fourths interest in and to the undivided interest in said estate, of which she, said Eliza O'Brien, was seized when she executed power of at-
90 torney, it was proper and necessary that he, Phillip, should execute said instruments in the names of all of said principals, and apparently warrant the title therein apparently conveyed, in the manner and by the use of the language therein used, and the said Philip, relying on the representations of the said Branch, and reposing full confidence in his good faith as a lawyer, did assent to the use of the language therein used in regard to said warranty, though the said branch and the said Sargent well knew at the time that the said Philip did not intend to bind himself personally, or the said Eliza O'Brien, further than the conveyance of three-fourths of

the interest in said estate which she had at the time of the execution of said power, and that he relied wholly upon them to properly express in said instruments his said intention in this particular.

SEC. 20. That the said Eliza O'Brien, of Ireland, never did, in any manner, either by word or act, concur in or ratify said conveyances by Philip to the said Branch and Sargent, but, on the contrary, she wholly ignored the same, and did, on the — day of May, 1878, executed said conveyance to the said Eliza M. O'Brien without
91 without reference whatever to said pretended conveyances to Branch and Sargent, they both being immediately after informed of the execution of the same, to wit, within sixty days thereafter, and plaintiffs say that said conveyance to Branch and Sargent were and are absolutely void, because the same were executed for considerations wholly unwarranted by the terms of said power of attorney.

SEC. 21. And should your honors be of the opinion that said apparent conveyances to Branch and Sargent, which are set forth in said Exhibits X and Y, were not, on account of the considerations for which the same were executed, wholly unauthorized by the tenor of said power of attorney, and therefore void, then plaintiffs, further complaining, say, in relation to said instrument last referred to, that, in truth and fact, at the time of the signing and delivery of them a large portion of the lands described in Exhibit A, and amounting to as many as fifty thousand acres or thereabouts, and constituting probably more than half of the lands of which the said deceased Edward died seized, were wholly free from litigation, and the
92 titles to the same, in the estate of the said Edward Hanrick, deceased, were good and wholly uncontested by any person or persons as against said estate; that for many years anterior, to wit, for more than ten years previous thereto, the titles to about thirty or forty thousand acres of said fifty thousand acres referred to next above were and had long been perfect, and had not been disputed in the courts of the country by any person claiming the same adversely to the title of which the said Edward Hanrick died seized, and that therefore said representations made by the said Branch in regard to the conditions of the titles of said estate were false and fraudulent.

SEC. 22. That his, Branch's, said representations in regard to said eleven leagues of land appertaining to said estate having been recently lost to the same by said adverse decision were also wholly false and fraudulent.

SEC. 23d. That his representations in regard to his, Branch's, having been associated with the said Hale in the prosecution of said suit and of his having succeeded in great part to the legal
93 business of the said Hale on the latter's death were also false and fraudulent.

SEC. 24. That his, Branch's, said representations in regard to a portion of said estate going to waste for want of attention, and of the danger of Edward G. Hanrick selling off the lands appertaining to said estate at probate rate, and of thus placing them beyond the reach of said non-resident heirs, were also false and fraudulent.

SEC. 25. That each and every one of said false representations had a material effect in influencing the said Philip O'Brien to sign said instrument in favor of said Branch and Sargent, and that had not said false representations, or some of them, been made to him as aforesaid, or had he then and there known the falsity of the same, or any of them, he would not have signed said instruments as aforesaid; that he was induced by said false representations in regard to the condition of said title to agree to give a larger portion of said lands to the said Branch and Sargent than he would otherwise have done.

That he was induced by said false representations in regard
94 to portions of the estate going to waste, and in regard to said possible probate sales, and in regard to the necessity of taking immediate steps to recover said eleven leagues of land granted to La Serda to act in the matter of signing said instruments with greater haste and on less investigation than he would otherwise have done. That he was also induced by said false representations in regard to the said Branch having been associated with the said Hale, and of having succeeded in a great part to the latter's legal business, to repose greater confidence in the integrity and ability of the said Branch than he would otherwise have done, and thus to have acquiesced without suspicion in the said Branch's suggestions in regard to the manner and form of said contract, and in regard to said instruments signed in connection with the same, being led by said representations to believe, and so believing that Branch would not try to overreach him, Philip, or his principal, or permit the said Sargent so to do, and that he, the said Branch, would carefully protect the interests of him, Philip, and his principal in the terms of said contract and in the execution of the instruments connected with the same.

95 SEC. 26. That had he, Philip, been aware of the cunning and unscrupulous character of the said Branch which the false representations hereinbefore set forth show him to have been possessed of, he, Philip, would never have entrusted to him the matters hereinbefore named, or have signed said instrument as hereinbefore detailed.

96 SEC. 27. That by means of the artifice and deceit hereinbefore shown to have been practiced by the said Branch in procuring the signing of said instruments in favor of himself and Sargent, and by taking advantage of the confidential relationship, which then and there existed between Philip and said parties, they, the said Sargent and Branch, were enabled to overreach, and did overreach, him, Philip, and obtain an unconscionsable advantage of him and of his principal; that the consideration promised on which said deeds were executed was grossly inadequate, the interest thus conveyed to the said Branch and Sargent being reasonably worth, to wit, the sum of $200,000; that while in said deed to Branch the payment of the consideration therein referred to is acknowledged, no consideration had up to the time of the execution of said deed been paid by the said Branch, but that he thus worded the same in accordance with a deliberate plan on his part to overreach and

defraud the said Philip and his principal, as aforesaid; that the said Branch failed to inform the said Philip at the time of the execution of the same of the legal force and effect of the words therein
97 used in regard to said consideration, but permitted the said Philip to believe, and the said Philip did believe, that the consideration of said deed was said promise on the part of Branch, and that the consideration in said deed would in no way estop him from setting up the part of said promise.

SEC. 28th. That the said Sargent and Branch have wholly failed to comply with their said promises, and have expressly refused so to do; that the said Sargent did fail and refuse to give the said Philip and his wife a home in the former's house, as he agreed to do, but did on or about the — day of April, 1878, order the said Philip and his wife out of his house, and did forbid his remaining there without any fault on the latter's part, nor did he provide or offer to provide other suitable board for him and his wife; and the said Sargent did on or about, to wit, the — day of April, 1878, expressly abandon said contract, and did then inform the said Philip that he would not advance a dollar with which to *to* pay said expenses, of which failing and refusal of the said
98 Sargent to perform that part of the said contract which he had specially taken upon himself to do, the said Branch was immediately notified; nor has either the said Sargent or the said Branch, ever since that time, advanced any money for that purpose or taken any steps whatsoever to fulfil their said agreement in regard to said expenses, but have wholly abandoned the same.

SEC. 29. And the said Branch also did wholly fail and refuse to perform the share of said contract which he especially took upon himself, nor has he ever instituted or attempted to institute, or offered to institute, any legal proceedings for the recovery of said lands, nor did he, after the signing of said deeds, ever take any steps whatsoever for the purpose of establishing the title of the said Eliza O'Brien, or of her vendees, in and to said lands, but he has wholly failed and refused so to do; and he did, on or about the — day of April, 1878, substantially inform the said Philip that he would not institute any legal proceedings whatsoever or take any steps in relation to said matters until the said Philip should furnish
99 him with the sum of at least $250, and that he shortly thereafter ceased and refused to communicate with the said Philip on said subject although the said Branch well knew that the said Philip, on account of his poverty and that of his principals, would never have signed said instruments in favor of the said Branch and Sargent but for the assurance on the part of said Branch that the expenses would be paid by them, and that neither he, the said Philip, or his principals, should ever be called upon to pay the same or any part thereof. That said failure and refusal on the part of said Branch and Sargent to comply with their said promises was in accordance with a deliberate plan and intent on their part at the time of the execution of said deeds not to comply with their said promises. That at the time of the execution of the same neither of them ever did intend to comply with said promises which induced the

said O'Brien to execute said conveyances, but said promises were made for the purpose only of overreaching and defrauding the said O'Brien and his said principals out of the interest in said lands which said deeds purport to convey.

100 SEC. 30. That on the — day of ——, 1879, the said heirs of James Hanrick instituted a suit of trespass to try title against the said Edward G. Hanrick in the district court of Falls county, Texas, for the recovery of their undivided one-third interest in a portion of said lands described in Exhibit A, said suit being styled "No. 1728, Nicholas Hanrick *et al. vs.* Edward G. Hanrick *et al.*" That on the trial of the points of law involved in said *said* the demurrer of the defendant was sustained, the same being to the effect that since James Hanrick was an alien when descent was cast, neither he, nor any of the alien heirs of Edward Hanrick, deceased, inherited an interest in his estate; from which ruling of the court the plaintiffs appealed. That the said Wm. Brady, for himself and for the said Eliza M. O'Brien, did at great expense, furnish additional counsel to said appellants for the purpose of assisting them in the proper presentation and argument of said cause in the supreme court of Texas, and did contribute very materially to the success of said appellants in obtaining the ruling of the supreme court, as the same was in fact ob-

101 tained, to the effect that the said James Hanrick, though an alien when descent was cast, nevertheless did inherit an interest in said estate in the same manner as though he were a citizen of Texas. In which ruling all the parties claiming an interest in the lands appertaining to said estate from and under any of said alien heirs were materially interested.

SEC. 31. And plaintiff- say that they did, on the 14th day of February, 1880, institute this suit at law of trespass to try title for the recovery of their interest in the lands described in said Exhibit "A," which are situated in Falls county, against the said defendant, Edward G. Hanrick, in this court; and also a similarly styled cause, except as to number, was instituted by them in the circuit court of the United States for the western district of Texas, at Austin, for the recovery of their said interest in the lands appertaining to said estate situated in the latter district, which said suits have been vigorously prosecuted down to the present time; of the institution and prosecution of which they, the said Branch and Sargent, have ever been fully informed.

SEC. 32. That at no time since the said Sargent and Branch

102 refused to comply with the terms of their said agreement, which constituted the consideration on which said instruments described in said Exhibits X and Y were executed, to wit, at no time since the summer of 1878 until on or about the — day of ——, 1881, the same being long after the institution of said suits in said Federal courts, did they, the said Sargent and Branch, intimate or in any manner indicate to plaintiffs that they had or would claim an interest in said lands by virtue of said instruments last referred to; nor have they ever performed or tendered to the said Eliza O'Brien, of Ireland, or to her said venders, or to any of the heirs of James Hanrick, deceased, any assistance whatsoever in the prosecu-

tion of the suits hereinbefore mentioned and in the obtaining of said ruling in the supreme court of Texas.

SEC. 33. That at the time of the institution of this suit plaintiffs were not aware, nor had they any reason to believe, that the said John B. Sargent or the said Wharton Branch, or either of them, claimed, or would presume to claim, any interest in said lands
103 by virtue of said contract, which they had both long since abandoned, or by virtue of said instruments last referred to, since, for nearly two years anterior to the institution of said suits at law, neither the said Branch -or the said Sargent had, in any manner whatever, indicated an intention or disposition of fulfilling their agreements in consideration of which said instruments were signed in their favor, nor had said Branch evinced any disposition to violate the trust reposed in him as the custodian of said instruments, by recording the same, or by using or permitting any use of the same, inconsistent with their character as escrows, or in such a manner as to cast a cloud upon the title of plaintiff; nor did he, Branch, nor did the said Sargent, according to the belief of plaintiff-, make any improper use of said instruments till after the decision of the supreme court of Texas in the said case of Nicholas Hanrick *et al. vs.* Ed. S. Hanrick, wherein it was decided as aforesaid that aliens were entitled, under the laws of Texas, to inherit lands in said State at the time of the death of the said deceased Edward;
104 but shortly after said decision was rendered, to wit, on the — day of August, A. D. 1881, and more than eighteen months after the institution of this suit at law in the United States circuit court at Waco, the said Branch caused said three instruments set forth in said Exhibits W, X, and Y to be recorded in the office of the county court of Falls county, Texas.

The premises considered, plaintiffs pray that they have and recover of the said Wharton Branch & John B. Sargent, as well as the said Ed. G. Hanrick, an undivided one-third interest in said lands described in said Exhibit A, and for all other relief, both general and special, and for cost of court.

BRADY & RING,
J. M. ANDERSON,
Att'ys for Plaintiffs.

105 EXHIBIT O.

Know all men by these presents that we, James Hanrick, John Hanrick, and Elizabeth O'Brien, all of the county of Wexford, Ireland, in consideration of one dollar and other valuable considerations paid by William Jenkins, Jr., of Boston, in the county of Suffolk and Commonwealth of Massachusetts, the receipt whereof is hereby acknowledged, do hereby give, bargain, sell, and convey unto the said William Jenkins, Jr., his heirs and assigns, all the right, title, and interest which we or any of us have in or to the following-described tracts of land, situated in the State of Texas, which belonged to Edward Hanrick, late of Montgomery, Montgomery county, State of Alabama, deceased, A. D. 1865, or in which he had, or claimed to have, a right, title, and interest, and known and described as follows, to wit:

First. A tract of forty-four thousand two hundred and eighty (44,280) acres in Williamson county, originally granted to Rafael A. Guirie.

Second. A tract of forty-four hundred and twenty-eight (4,428) acres in Falls county, which two tracts of land was granted to one Rafael A. Guirie.

106 Third. A tract of twenty-one thousand four hundred and seventy-six (21,476) acres in Falls county, which tract of land was granted to one Pedro Zarza.

Fourth. A tract of forty-eight thousand seven hundred and eight (48,708) acres in Falls county, which tract of land was granted to one Antonio de la Serda.

Fifth. A tract of forty-eight thousand seven hundred and eight (44,708) acres in Milam county, which said tract of land was granted to one Miguel Davilla.

Sixth. A tract of forty-four hundred and seventy-eight (4,478) acres in Liberty county, which tract of land was granted to one J. F. De Rumazor.

Seventh. A tract of twenty-two hundred and fourteen acres in Liberty county, which tract of land was granted to one Andrew Weaver.

And also any interest which we or any of us have, or may have, in or to any other land in said State of Texas, by reason or virtue of our being heirs of the said Edward Hanrick, deceased, to have and to
107 hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said William Jenkins, Jr., and his heirs and assigns, to their own and behoof, forever. And we do hereby, for ourselves and our heirs, executors, and administrators, covenant with the said grantee and his heirs and assigns that we are lawfully seized of an interest in fee-simple of the granted premises aforesaid; that they are free from all encumbrances by us incurred; that we have good right to sell and convey the same as aforesaid, and that we will, and our heirs, executors, and administrators shall, warrant and defend the same to the said grantee and his heirs and assigns, forever, against the lawful claims and demands of all persons.

In witness whereof we, the said James Hanrick, John Hanrick, and Elizabeth O'Brien, hereunto set our hands and seals, this first day of February, in the year one thousand eight hundred and seventy-eight.

JAMES HANRICK,
JOHN HANRICK,
ELIZABETH O'BRIEN,
By PHILIP O'BRIEN,
Their Attorney-in-Fact.

108 Signed and sealed in presence of—
EDWARD J. JONES.
FANNIE J. SARGENT.

EXHIBIT W.

STATE OF TEXAS, *County of Galveston:*

Know all men by these presents, that I, John B. Sargent, of the city of Boston, State of Massachusetts, party of the first part, in consideration of one dollar to me paid by Wharton Branch, of the city and county of Galveston, Texas, besides other good and valuable considerations, have granted, bargained, and sold, and do hereby grant, bargain, sell, alien, convey, and confirm unto the said Wharton Branch, party of the second part, his heirs and assigns, forever, one undivided one-half of my interest in the estate of Edward Hanrick, deceased, in the State of Texas, my interest being one-half of three-fourths of said estate, as appears by deed of this date to me, from the heirs of said Edward Hanrick, deceased, and for more particular description reference is had to said deed to me, the same being in
109 part as follows, to wit. Ten leagues in Williamson county, granted to Rafael A. Guirie; also one league in Falls county, same grant; 21,476 acres, supposed to be in Falls and Williamson counties, granted to Pedra Zarza; eleven leagues in Falls county, granted to Antonio de la Serda; eleven leagues in Milam county, granted to Miguel Davilla; one league in Liberty county, granted to J. F. De Rumazar; and one-half league in Liberty county, granted to Andrew Weaver; to have and to hold all and singular the above-described and conveyed premises and property, with all the rights, privileges, hereditaments, and appurtenances thereunto belonging or in any wise appertaining unto the said Wharton Branch, party of the second part, his heirs or assigns, forever; and I, the said party of the first part, do hereby bind myself and heirs, executors and administrators, unto the said party of the second part, his heirs and assigns; that I am now well seized of all and singular the said property and premises; that I have good right and lawful authority to make this sale and conveyance of the same; that my interest in said
110 property and premises are free and clear of all and every encumbrance, and that unto the said party of the second part, my heirs and assigns; that I and my heirs, executors, and administrators will forever warrant and defend the same against all adverse lawful claim or claims whatsoever. The words "my interest in" interlined before signing.

In testimony whereof I ho hereunto affix my hand and seal, this 4th day of February, A. D. one thousand eight hundred and seventy-eight.

JOHN B. SARGENT. [L. S.]

Witnessed at request of grantors.
PHILIP O'BRIEN.
C. G. HATCH.

EXHIBIT X.

THE STATE OF TEXAS, *County of Galveston:*

Know all men by these presents that I, Philip O'Brien, of Boston, Massachusetts, acting for myself and for my wife, Eliza M. O'Brien,

and for James Hanrick and John Hanrick and Elizabeth O'Brien, heirs of Edward Hanrick, deceased, parties of the first part,
111 in consideration of one dollar to us paid by Wharton Branch, of the city and county of Galveston, Texas, besides other good and valuable considerations, have granted, bargained, sold, and do hereby grant, bargain, sell, alien, convey, and confine unto the said Wharton Branch, party of the second part, his heirs and assigns forever, one undivided one-fourth interest of, in, and to all of the property of the estate of Edward Hanrick, deceased, situated in the State of Texas, and for more perfect description reference is had to the inventory of said estate and the records pertaining thereto, Edward G. Hanrick being the administrator of said estate, and *indebted* to one-fourth thereof, and the description of the same is *his* part as follows, to wit: Ten leagues in Williamson county and one league in Falls county, granted to Rafael A. Guirie; 21,476 acres, supposed to be in Falls and Williamson counties, granted to Pedra Zarza; eleven leagues in Falls county, granted to Antonio de la Serda; eleven leagues in Williamson county, granted to J. F. De Rumazar; and one-half league in Liberty county, granted to Andrew Weaver;
112 to have and to hold all and singular the above-described and conveyed premises and property, with all the rights, privileges, hereditaments and appurtenances thereunto belonging, or in anywise appertaining unto the said Wharton Branch, party of the second part, his heirs and assigns, forever, and we, the said parties of the first part, do hereby bind ourselves, our heirs, executors, and administrators unto the said party of the second part, his heirs and assigns, that we, and our heirs, executors, and administrators will forever warrant and defend the same against all adverse lawful claim or claims whatsoever. The words "our interest in" interlined before signing.

In testimony whereof, we do hereunto affix our hands seals, using scrolls for seals, this fourteenth day of February, A. D. one thousand eight hundred and seventy-eight.

PHILIP O'BRIEN, [L. S.]
JAMES HANRICK, [L. S.]
JOHN HANRICK, [L. S.]
ELIRABETH O'BRIEN, [L. S.]
By PHILIP O'BRIEN,
Their Attorney-in-Fact.

Witnessed at request of grantors.
JOHN B. SARGENT.
C. D. HATCH.
F. BARNARD.

113 EXHIBIT Y.

THE STATE OF TEXAS, *County of* ——— :

Know all men by these presents that I, Philip O'Brien of the city of Boston, county of Suffolk, Massachusetts, acting for myself and my wife, Eliza M. O'Brien, and for James Hanrick, John Hanrick, and Elizabeth O'Brien, heirs of Edward Hanrick, deceased, parties

of the first part, in consideration of one thousand dollars to be paid to us by John B. Sargent of the same place, besides other good considerations to be rendered, have granted, bargained, and sold, and do hereby grant, bargain, sell, alien, convey, and confirm unto the said John B. Sargent, party of the second part, his heirs and assigns forever, one undivided one-half interest of, in, and to all the property of the estate of Edward Hanrick, deceased, situated in the State of Texas, to which we are in any way entitled — our interest therein being three-fourths thereof, and for more perfect description reference is had to the inventory of said estate, and the records pertaining thereto, Edward G. Hanrick being the administrator and entitled to one-fourth thereof, and the description of the same in part
114 as follows, to wit: Ten leagues in Williamson county, granted to Rafael A. Guirie; one league in Falls county, same grant; (21,476) acres, supposed to be in Falls county and in Williamson county, granted to Pedro Zarza; eleven leagues in Falls county, granted to Antonio de La Serda; eleven leagues in Milam county, granted to Miguel Davilla; one league in Liberty county, granted to J. F. De Rumazar; and one-half league in Liberty county, granted to Andrew Weaver to have and to hold all and singular the above described and conveyed premises and property, with all the rights, privileges, hereditaments, and appurtenances thereunto belonging or in any way appertain-g, unto the said John B. Sargent, party of the second part, his heirs or assigns, forever, and we, the said parties of the first part, do hereby bind ourselves, our heirs, executors, and administrators hereto — the said party of the second part, his heirs and assigns; that we are now well seized of all and singular the said property and premises, and that we have good right and lawful authority to make this sale and conveyance
115 of the same; that said our interest- in the property and premises are free and clear of all and every encumbrance, and that unto the said party of the second part, his heirs and assigns, that we and our heirs, executors, and administrators will forever warrant and defend the same against all adverse lawful claim or claims whatsoever.

In testimony whereof we do hereunto affix our hands and seals, using scroll for seals, this fourteenth day of February, A. D. one thousand eight hundred and seventy-eight.

PHILIP O'BRIEN, [L. S.]
ELIZA M. O'BRIEN, [L. S.]
JAMES HANRICK, [L. S.]
JOHN HANRICK, [L. S.]
ELIZABETH O'BRIEN, [L. S.]
By PHILIP O'BRIEN,
Their Attorney-in-fact.

Witnessed at the request of grantors.
WHARTON BRANCH.
FRED. BRANCH.
W. G. HATCH.

EXHIBIT Z.

To all whom these presents shall come, we, James Hanrick and John Hanrick, both of Tamanine, farmers, and Elizabeth O'Brien, of Tomfarry, widow, all in the county of Wexford, send greeting:

116 Whereas Edward Hanrick, late of Montgomery, in the State of Alabama, United States of North America, lately died intestate, unmarried and without issue, and whereas we the undersigned, James Hanrick, John Hanrick, and Elizabeth O'Brien, are respectively the brothers and sister of the said Edward Hanrick; and whereas we, the said James Hanrick, John Hanrick, and Elizabeth O'Brien, in our own right and in virtue of the laws and customs of the said United States of North America, are respectively now legally entitled to a distributive share of the estate and effects of the said Edward Hanrick, deceased: Now know ye that we, the said James Hanrick, John Hanrick, and Elizabeth O'Brien, having and reposing great confidence in Mr. Philip O'Brien, of number 41 North Pearl street, Albany, in the State of New York, merchant clerk, have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint, the said Philip O'Brien our true and lawful attorney, and do hereby grant him full power and authority, for us and in our names and to our use, to ask, demand, and sue for, and by all lawful ways and means to recover and receive from Edward G. Hanrick, or of and from the administrator of the said Edward Hanrick, and of and
117 from all the other person or persons whomsoever, all our distributive share or shares of the estate and effects of the said Edward Hanrick, which we are by law entitled unto, and all other sum or sums of money, goods, chattels, and effects, which, by the said Edward Hanrick dying intestate, or on any other account, belonging or of right ought to belong to us, and on receipt or recovery thereof, or of any part thereof, to sign and give a good and effectual receipt for the same, and also to recover of and from the said Edward G. Hanrick, or of and from the administrator or legal personal representative of the said Edward Hanrick, whatsoever and wheresoever, all and singular, our distributive share or shares of the messuages or tenant's land, hereditaments or other, the real or chattel estate, or estate whatsoever, and wherein the said intestate, Edward Hanrick, at the time of his decease, had any estate, term, right, or interest whatsoever, and all and singular, the appurtenances thereunto belonging, and for us, and in our names, into and upon all or any part thereof, or the name of the whole to enter and become thereof possessed, and to keep and retain possession for our use and benefit, or to sell, let, or absolutely dispose of our distributive
118 share of and in the same, or to join and concur in the letting, sale, or disposition of the same messuages or tenement's lands, hereditaments or other real or chattel estates, with their appurtenances, at such time or times, and in such manner as he shall think proper and expedient, and to do all such acts and to take such proceedings and use all such lawful ways and means as he shall deem necessary to assert and establish our right to all and any part of

such lands, real or chattels estates, and also for and on behalf and in the names of us, and as our acts and deed, to make, sign, seal, execute, and deliver all such agreements, contracts, leases, conveyances, and assurances, with all usual and reasonable covenants therein, on our part, of all or any part of the said messuages, tenements, premises, estate, and effects as shall be found necessary or expedient, and to receive and take our share or shares of the purchase moneys or other considerations, for such part thereof as shall be sold, and the rents and profits have accrued or shall hereafter accrue or become due for such parts thereof as have been or shall be set or let to and for our use, and, in our names, to give and sign proper receipts for the same respectively, and also for us and in our names, to call for, examine, settle, adjust, and sign all ac-
119 counts now pending, and *and* which may hereafter depend between us and any other or persons whomsoever, in relation to or in respects of the assets, real and personal estate and effects of the said Edward Hanrick, deceased, and to commence any action, suit, or other proceedings at law or in equity, against any person or persons, in respect of any of the matters or things aforesaid, and to appear to or defend any action, suits, or other proceeding to be commenced against us, and to proceed to judgment or execution or become non-suits or suffer judgements to go by default in any such action, suits, or other proceedings, or to compromise the same, as to our said attorney shall seem most expedient, and also to do, perform, and execute all such other acts, matters, or things whatsoever, as shall or may be requisite or necessary, in or about the premises, as fully and effectually as we could have done if personally present, and also to substitute or appoint any person or persons to act under or in place of him, our said attorney, and for all or any of the matters or purposes aforesaid, and every such substitution at pleasure to revoke, hereby ratifying and confirming and agreeing to
120 ratify and confirm whatever our said attorney or his substitute or substitutes shall lawfully do or cause to be done in about the premises by virtue of these presents, and we hereby revoke all former powers or letters of attorney, given by us in respect of any of the matters or things, either to Henry C. Semple, of Montgomery, in the State of Alabama, Esquire, attorney-at-law, or any to other person or persons whomsoever.

In witness whereof we have hereunto subscribed our names and affix our seals, this sixteenth day of May, one thousand eight hundred and seventy.

JAMES HANRICK. [L. S.]
JOHN HANRICK. [L. S.]
ELIZABETH O'BRIEN. [L. S.]

Signed, sealed, and delivered in the presence of—
JOHN KEHOE.
CATHERINE MURPHY.

121 EXHIBIT A.

Description of the land in Falls county, Texas, of which the said Edward Hanrick died seized:

Tract Number One.

The same containing eleven leagues of land originally granted to Atanacio de La Serda, being situated in said county on the left bank of the Brazos river, at or near the entrance therein of an old bed of the river, and bounded and described as follows, to wit: beginning at a point on the bank of said river near the old bed aforesaid, from which a sycamore ten inches in diameter bears south 47 west 15 varas distant, and another fifteen inches in diameter bears south 84½ west 21 varas; thence running north 62 east 27,626 varas to a stake in prairie; thence north 28 west 10,000 varas to a stake on bank of said river, from which a poplar 12 inches in diameter bears south 58 east 10 varas, and another 6 inches in diameter bears south 58¾ east 22 varas; thence following the meanders of said river to the place of beginning. From the foregoing-described, eleven leagues of land, however, are to be taken the following-described tracts, to wit:

1. A tract of 649 acres conveyed by the said Edward Han-
122 rick, deceased, to the county of Falls, and including the town of Marlin, beginning at the southwest corner of the said town tract at a stake from which a mesquite seven inches in diameter bears north 55 east 104 varas; another mesquite six inches in diameter bears south 22 east 400 varas; thence west 1,900 varas to a stake; thence south 1,900 varas; thence east 1,900 varas to the place of beginning.

2. A tract of land conveyed by said deceased Hanrick to J. M. Stiner, being in conflict with the W. N. P. Marlin survey, beginning at the northwest corner of said survey and running north 45 and east with the north line of the same to a point whence a line running parallel with the western boundary to the southern boundary of said Martin survey will include the quantity of 320 acres. Also 320 acres to be taken by commencing on said north line where the above-named 320-acre survey turns and running with said parallel line of said above-named 329 acres to a point where a line running parallel with the north boundary line 1,000 varas will include said quantity of 320 acres.

3d. A tract of land conveyed by the said Edward Hanrich,
123 deceased, to B. W. Shields, the same being a part of said La Serda grant: Beginning at the southwest corner of a survey of 940 acres made for the Marlin town tract; thence south 44 west 5,390 varas to stake on the Brazos river a cottonwood tree, twelve inches in diameter, bears south 57 east 20 varas, and another, thirteen inches in diameter, south 1⅛ west 15 varas; thence down said Brazos river with its meanders 2,820 varas to corner or hackberry, four inches in diameter, from which hackberry, ten inches in diameter, bears north 20 west 1½ varas; thence north 44 west 5,510 varas to stake, from which post oak, sixteen inches in diameter, bears north 56 west 43 varas; thence north 44 west 1,435 varas to beginning, containing 1,500 acres. And another survey of 1,500 acres, beginning at southwest corner of said town tract; thence south 44 west 5,390 varas to a stake on the river, from which a cottonwood,

twelve inches in diameter, bears south 57 east 20 varas to another, thirteen inches in diameter, which bears south 1½ west 15 varas; thence up the river with its meanderings 2,440 varas to corner or two hackberrys, ten inches in diameter, from which a
124 cottonwood, 18 inches in diameter, bears north 5 west 6 varas; thence north 44 east 5,540 varas to stake; thence south 46 east 1,802½ varas to beginning.

4. A tract of land containing about 700 acres, the same being all that portion of a grant of — acres to Green Durkin which is in conflict with said Atanacio de La Serda grant, beginning at the point where the south line of said La Serda grant intersects the east line of said grant to Green Dunkin; thence north 28 west to the northwest corner of said Dunkin grant; thence north 62 west to the east line of said La Serda; thence south 28 east with the La Serda line to the southeast corner of said La Serda grant; thence south 62 west with the south line of the La Serda to the place of beginning.

5. A tract of land containing about 800 acres, the same being all that portion of a league of land granted to John Marlin, beginning at a point where the west line of said Marlin league intersects the south line of said La Serda grant; thence north 28 west with said Marlin line to the south line of the said T. J. Chambers' grant of ten leagues; thence north 45 east with the said Chambers'
125 line to the northeast corner of the said John Marlin league; thence south 28 east with the east line of the said Marlin league to the south line of the said La Serda; thence with the south line of the La Serda south 62 west to the place of beginning.

Tract Number Two.

The same containing five leagues of land situated in Falls county, lying in two bodies, the first of which containing four leagues of land, more or less, adjoins the survey of Ignacio Galinda: Beginning at the lower corner of said survey on the right bank of the Brazos river; thence south 62 west following the lower line of said survey 19,332 varas to the second corner of this tract; thence south 28 east 5,000 varas to the third corner; thence north 62 east 730 varas to the Brazos river for the north corner; thence up the river with its meanderings to place of beginning. The second of said tracts of land, containing one league, begins at the west or northwest corner of the survey of two leagues of Juan Jose Acosta; thence south 62 west 10,000 varas; thence south 28 east 5,000 varas; thence north 62 degrees east 10,000 varas; thence north 28 degrees west to the place of beginning. From the foregoing five leagues of land, however, are to be taken:

126 1. A tract of land containing 320 acres, vested by decree of court in Henry Juty: Beginning at a stake in prairie for southwest corner; thence north 51 east 283 poles to stake for west corner, from which a post oak marked 1 bears north 51 west 1 pole and 7 links; thence south 39 east 18 poles to stake; thence south 39 east $136\frac{3}{2}\frac{8}{1}\frac{3}{4}$ poles, to stake, from which post oak, seven inches in diameter, marked 11, bears south 35½ west 13 links; another

marked 1 bears west 60½ 14 links; thence south 61 and west 360 poles; thence north 38 east 136 2/85 poles to beginning.

2. A tract containing 668 acres out of the said Zarza grant, beginning at a cedar stake on south line of the Zarza grant, from which an elm marked × bears south 74½ east.

Tract Number Three.

A tract of land containing one league, more or less, the same being a portion of eleven leagues of land granted to Rafael Aguire, being situated in Falls county, Texas, on a branch of Cow Bayou: Beginning at the southwest corner of two leagues of land granted to Juan Jose Acosta, which is a stake in the upper boundary of four leagues of land granted to Jose Antonio Monchaca, from
127 which a cedar five inches in diameter bears north 47 east 14 varas distant, and an elm six inches in diameter bears south 32 west 6 varas; thence running south 62 west 10,000 varas to stake inside of boundary for the second corner; thence north 28 west 250 varas to the southwest corner of a league of land granted to Pedro Zarza; thence north 62 east with the southeast boundary 10,000 varas to the southeast corner in southwest boundary of the land of Acosta; thence south 28 east to the beginning, said tract being delineated; thence north 62 east 1,900 to stake in thicket for northeast corner, crossing Cow Bayou at 80 varas, and recrossing thence south 28 east 1,933 varas to beginning.

II.

Description of land in Williamson county, Texas, of which the said Edward Hanrick died seized: A tract of land containing ten leagues more, being all that portion of 11 leagues of land granted to Rafael D. Arguire, situated in Williamson county, lying on the river San Gabriel and Williamson creek, and adjoining lands
128 granted to Miguel Davilla and Pedro Zarza: Beginning at the point forming the southwest corner of the land of Pedro Zarza and southwest corner of that of Milguel Davilla at a mound of earth; thence running south 20 along the western boundary of said Zarza, and at 4,800 varas crossing Williamson creek, and at 9,100 varas crosses the San Gabriel, and at 10,961 varas passes the southwest corner of the land of the aforesaid Zarza, and at 12,500 varas a stake is planted on a mound in the prairie, which is the second corner; thence north 70 west 20,000 varas to a stake planted in another mound for the third corner; thence north 20 east 12,506 varas, crossing the San Gabriel and Williamson creek to a stake in another mound for the fourth corner; thence south 70 east 20,000 varas to the place of beginning, including ten leagues of land.

III.

Eleven leagues of land granted to Miguel Davilla, situated in the counties of Bell, Milam, and Williamson.

IV.

One-half league of land situated in Liberty county, Texas, granted to Andrew Weaver, and one league of land situated in the same county, granted to J. F. De Munsijes.

129 And afterwards, on April 5th, 1883, the following trial amendment was filed, endorsed, to wit:

No. 14. U. S. cir. court. Eliza M. O'Brien *et al. vs.* Ed. G. Hanrick. Plaintiffs' trial amendment. Filed April 5th, 1883. J. H. Finks, clerk.

Which is in words following:

Trial Amendment.

ELIZA M. O'BRIEN *et al. vs.* EDWARD G. HANRICK.

And now comes the plaintiffs, with leave of the court first had and obtained, files this their trial amendment, and withdraws so much of their former pleadings as is inconsistent with the correction thereto herein intended to be made. To the first section on page 6 of plaintiffs' supplemental petition, plaintiffs add the words "said power of attorney being the same as that referred to in the pleadings of Branch and Sargent." They also add between the sixth and seventh lines of said section the words "among other things." They add the words "substantially" after the word described in section
130 six of said petition. They add to sec. nine of said petition "said deeds described substantially in said Exhibits X & Y, being the same as those referred to in said Branch & Sargent's pleadings. They substitute in place of the words Exhibit "A," on the last page of plaintiffs' said so-called supplemental petition, the words "plaintiffs' 4th amended original petition."

BRADY & RING,
J. M. ANDERSON,
Att'ys for Pl'ffs.

131 *Judgment.*

UNITED STATES OF AMERICA:

Northern District of Texas and 5th Circuit at Waco.

Be it remembered, at the United States circuit court for said circuit and district, on the 6th day of April, 1883, at the April term, 1883, of said court at Waco,

Present: The Honorable Andrew P. McCormick, judge,

The following, among other things, was had and done, to wit:

ELIZA M. O'BRIEN *et als.*
vs.
EDWARD G. HANRICK. } No. 14.

APRIL 6TH, 1883.

On this day came on to be heard the above-entitled cause, and the plaintiffs, Eliza M. O'Brien and her husband, Philip O'Brien, and

William Brady and the intervener, John B. Sargent, and the defendant, Edward G. Hanrick, appearing, by their attorneys, and the intervener, Wharton Branch, appearing for himself personally, all parties announced ready for trial, and thereupon came a jury of twelve good and lawful men, to wit: C. W. Hickey, D. C. Carr, E. C. Swafford, J. B. Johnson, J. C. Bragg, R. Rutherford, J. W. Ballard, C. Rowan, J. P. Poole, H. P. Harrington, C. H. Moore, and
132 J. C. Pendleton, who were duly selected, empanneled, and sworn according to law, and who after hearing the evidence and the argument of counsel and having received the charge of the court, on the tenth day of April, A. D. 1883, retired to consider of their verdict; and after duly considering the same they returned into open court the following verdict, to wit: "We, the jury, find for the plaintiff. C. Rowan, foreman." It is therefore ordered and adjudged by the court that the plaintiffs, Eliza M. O'Brien and Philip O'Brien and Wm. Brady, have and recover of the defendant, Edward G. Hanrick, and of the interveners, Wharton Branch and John B. Sargent, one undivided one-third interest in and to the following-described lands and tracts of lands, being situated in Falls county, Texas: Tract number one, a certain tract of land, known as the Atunacia de la Serda eleven-league grant, situated in the county of Falls, on the left bank of the Brazos river, and bounded as follows, to wit: Beginning at a point where an old channel enters said river, called old bed of river, at a stake from which 15 varas a — ten in. bears south 47° west, and at 21 W. another 15 in. dia. to Hackberry
133 ten inches in dia., and twenty-one v's south 84½ west another; thence N. 62 E. 27,626 varas, crossing a creek, called Isaac creek, to a stake in the plain for a corner; thence N. 28° W. 10,000 varas to another stake in the plain; thence S. 62° W. 28,966 varas to a stake in the margin of said river, from which, 10 varas S. 38½° E., a cottonwood, 12 in. dia., another 6 in. dia., bears S. 8¾° E.; thence down the said Brazos river with its meanderings to the place of beginning and comprehending within its bounds one deed of eleven leagues of land, which said tract of land was granted to Mathew R. Williams as attorney for the said Antonacia de La Serda on the — day of ——, A. D. 1833.

Tract number two, containing two parcels of land, situated in said county of Falls, State of Texas, formerly granted by the proper officers of the State of Coahuila and Texas to Pedro Zarza, by his attorney-in-fact, Robert L. Williams, and described as follows, to wit:

The first of said tracts containing four leagues of land, more or less, adjoining the survey of Ignacio Galinda, beginning at the lowest corner of said survey, on the right bank of the Brazos river;
134 thence south 62° W., following the lower line of said survey, 19,330 varas, to a stake, for south corner, the second corner of this tract; thence S. 28° E. 5,000 v's to the third corner; thence N. 62° E. 21,780 varas to the Brazos river, for the fourth corner; thence up the river with its meanders to the place of beginning.

The second of said tracts containing one league of land, and beginning at the west or northwest corner of the survey of two

leagues of Juan Jose Acosta; thence S. 62 W. 10,000 varas; thence S. 28 E. 2,500 varas; thence N. 62 E. 10,000 varas; thence N. 28° W. to the place of beginning.

Tract Number Three.

The same being a tract of land lying and being in the county of Falls, and described as a part of the eleven-league tract granted to Rafael de Aguire, situated on a branch of Cow Bayou:

Beginning at the southwest corner of two leagues of land, granted to Juan Jose Acosta, which is a stake in the upper boundary of four leagues, granted to Jose Antonio Manchaca, from which a cedar five in. in diameter bears N. 47° E. 14 v's, and an elm 6 in. in dia. bears S. 32° W. 9 v's; thence running south 62 W. 10,000 varas to a stake planted in the said boundary for the second corner; thence
135 N. 28° W. 2,500 v's to the southwest corner of a league of land, granted to Pedro Zarza; thence N. 62° E. with the southeast boundary 10,000 varas to the southeast corner in southwest boundary of the land of Acosta; thence S. 20° east to the place of beginning, including one league of land more or less according to the original survey.

And it is further ordered that a writ of possession in favor of said plaintiffs' issue therefor; and that plaintiffs do have and recover of such interveners such costs by them incurred by reason of such intervention, and of defendant all cost- which were incurred herein not including any costs incurred by the said intervention, for which let execution respectively issue.

136 *Defendant's 1st Bill of Exceptions. Filed Octo. 9th,* 1880. *J. H. Finks, Clerk.*

Which is in words, to wit:

ELIZA M. O'BRIEN *et al. vs.* E. G. HANRICK.

Suit pending in the U. S. Circuit Court for the 5th Circuit and Northern District of Texas, sitting at Waco.

Be it remembered that on the call of this cause for trial the defendant, by his counsel, presented and urged his demurrer and exceptions to the petition of plaintiffs, as follows, viz:

ELIZA M. O'BRIEN *et al. vs.* E. G. HANRICK.

Comes the defendant in the above-styled cause, by his atty's, and excepting to plaintiff's petition herein filed, says the same is insufficient because:

1st. It appears from said petition that all persons interested in the subject-matter in controversy are not made parties.

2d. Because it appears from said petition that the vendor
137 of plaintiffs was, at the date of the death of Edward Hanrick, viz., in 1865, an alien, and not entitled to inherit any portion of the estate of said deceased situated in the State of Texas, nor does said petition show any right in pl't'ffs.

3d. Because it appears that nine years and more have elapsed since the death of said Edward Hanrick, wherefore if the plaintiffs or their vendor ever had right they are now barred by lapse of time.

4th. And further excepting to that part of said petition which alleges that in 1870 a general public statutory law was enacted in said Kingdom of Great Britain conferring on aliens the full rights of natural-born subjects of said kingdom, because the same can have no effect upon rights vested before that time, and because the same presents no issue material to the determination of this cause; wherefore the same should be struck out.

And further, this def't demurs and says that said petition presents no cause of action against this defendant, and of this he
138 prays judgment of the court; which exceptions and demurrer being heard by the court, and considered by the court, are overruled. To which ruling of the court the defendant, by his counsel, now here, in open court, upon said ruling being announced, excepts, and prays that his exceptions be noted on the record and that a bill of exceptions be signed and made a part of the record, which is accordingly done.

Approved Octo. 9, 1880.

A. P. McCORMICK,
U. S. Dist. Judge.

139 *Defendant's 2d Bill of Exceptions.*

Endorsed to wit: No. 14. E. M. O'Brien *et al. vs.* E. G. Hanrick. Bill of exceptions No. 2. Filed April 16th, 1883. J. H. Finks, clerk.

Which is in words to wit:

In U. S. Circuit Court, at Waco, Texas, Spring Term, 1883.

Eliza M. O'Brien *et al.*
v.
E. G. Hanrick. } No. 14.

Be it remembered that on this 4th day of April, A. D. 1883, before the parties announced ready for trial, the plaintiffs, by their counsel, read before the court the plea in abatement of the def't, E. G. Hanrick, filed April 3d, 1883, as follows, viz:

In U. S. Circuit Court, 5th Circuit and N. D. of Texas, at Waco Oct. Term, 1882.

Eliza M. O'Brien *et al vs.* E. G. Hanrick.

140 Comes the defendant, E. G. Hanrick, and shows to the court that a large portion of the lands sued for by plaintiffs in this action and described in their 4th amended petition herein filed are, and were at the time this suit was brought, in the actual adverse occupation of persons not sued in this action; that many of said persons hold in severalty tracts of land, parts and parcels of the land described in plaintiff's said petition, through right derived from Edward Hanrick, deceased, in his life time; that they and

their vendors took actual occupation of said tracts or parcels so claimed by them under right derived as aforesaid from pl't'ffs' alleged ancestor, Edward Hanrick, deceased, in the lifetime of said deceased, and have since and do now claim their said several holdings in full and absolute title; that the names of said several parties are numerous, viz: more than five hundred, all of whom, as well as the nature of their several claims, are well known to pl't'ffs; that among the number so holding def't states the following-named persons, all of whom reside in the
141 county of Falls, in the State of Texas, viz.: Wm. Killibrew, George A. King, J. D. Oltorf, Mrs. S. S. Ward, John Reynolds, Jesse Scruggs, Dan. Jackson, Gilbert Jackson, Mrs. Wm. Duty, Dr. Miller, Fielding Ruble, —— Smithart, besides many others too numerous to mention; also a large number of people who held when this suit was brought and now hold and occupy in severalty other parts and parcels of said land sued for by pl't'ffs in this action, claiming title in themselves, and have so held and claimed for more than ten years, viz.: Ed. McCullough, E. H. Featherston, Mrs. Martin, S. Magee, —— James Taylor, E. C. Stuart, J. P. Parker, Mrs. A. Steele, Marian Fairey, Sam. Bell, Rob't Smith, A. E. Watson, Mrs. — Bates, heirs of W. O. Smith, deceased, besides a great number of others too numerous to mention; also a great number of other people, who held when this suit was brought, and now hold and occupy in severalty parts and parcels of the land sued for, claiming title in themselves to the extent of their several holdings, viz: C. Boker, Doc. Hemphill, W. S. Clark, C. Whitaker, J. A. Martin, J. A. Holland, T. B. Watson, John Humphreys, B. W. Rimes, H. Rickelman, L. D. Forbes, P. Kersey, J. B. Evans, besides a great number of others too numerous to mention.

142 And def't further shows to the court that E. G. Gurley, who resides in said county of Falls, is now, and has been for more than ten years last past, jointly with this defendant occupying the tracts of land described in the Exhibits A, B, C, attached to def't's answer, under a chain of title in himself, to an undivided one-third interest therein; that he claims to have acquired his possession and right from the deceased Edward Hanrick in 1858, and has continuously since held, occupied, improved, used, and claimed said interest adversely to the plaintiffs, and has jointly with defendant occupied the entire tracts of land described in said Exhibits A, B, & C.

And further, this defendant shows that Nicholas, Annie, and Ellen Hanrick and others, claiming as the heirs of James Hanrick, deceased, are asserting, by suit in the district court of Falls county, State of Texas, a title to an undivided one-third interest in said lands; that the said heirs claim as their tenants Ike Carey, Wilson Hammers, S. B. Bryant, and David Barton, who are on portions
143 of said lands, occupying the same and resisting the right and claim of this defendant; all of which is well known to pl't'ffs in this suit.

And, further, defendant shows that John B. Sargent and Nell B. Carpenter, both of Boston, Massachusetts, and Wharton Branch, of

Galveston, Texas, claim to own and hold the interests in the lands described in pl't'ffs' petition claimed by plaintiffs and sued for by pl't'ffs in this action, said claim of said Sargent and Branch being by virtue of conveyance to them by Elizabeth O'Brien, James and John Hanrick, by deeds of prior date than the deeds of pl't'ffs', all of which is well known to pl't'ffs.

Wherefore def't avers that all of the before-named persons are not only proper, but necessary parties to this action, and he pleads their non-joinder and prays that this suit abate.

E. G. HANRICK.

Signed and sworn to before me, this 3d day of April, 1883.

J. H. FINKS, *Clerk.*

144 And the said counsel then presented and urged before the court their exceptions to said plea, as follows, viz: "That said plea presents no merits and shows no cause sufficient in law why the parties named therein are necessary parties defendants or why the same should be made parties in this suit;" which said exception was by the court sustained and the said plea in abatement was struck out, to which ruling of the court the defendant, E. G. Hanrick, by his counsel, did then and there except and prayed a bill of exceptions, which is granted.

Signed, sealed, and made part of the record.

April 16th, 1883.

A. P. McCORMICK,
Dist. Judge.

145 *Defendant's 3d and 4th Bill of Exceptions.*

Endorsed, to wit: No. 14. Eliza M. O'Brien *et al. vs.* E. G. Hanrick. Bill of exceptions Nos. 3d & 4th. Filed April 16, 1883. J. H. Finks, clerk.

Which is in words, to wit:

In U. S. Circuit Court, at Waco, Texas. Spring Term, 1883.

ELIZA M. O'BRIEN *et al.*
v.
E. G. HANRICK. } No. 14.

Be it remembered that on this 5th day of April, A. D. 1883, the pl't'ffs herein having filed their amended plea, styled "Pl't'ffs first supplemental petition, the defendant, E. G. Hanrick, by his counsel, thereupon, on the same day, filed his motion to dismiss as follows, viz:

"In U. S. Circuit Court, at Waco, Tex. Spring Term, 1883.

ELIZA M. O'BRIEN *et al.*
v.
E. G. HANRICK. } No. 14.

Comes the defendant, E. G. Hanrick, by his counsel, and
146 moves the court to dismiss this cause, because it appears from

the pleadings of pl't'ffs that this court has no jurisdiction to hear and determine the matters in controversy, and that pl't'ffs' right, if any they have, is a matter cognizable only by a court of equity.

GOODRICH & CLARKSON,
Att'ys for E. G. Hanrick."

Which motion being on said day brought to the attention of the court, and argument thereon being heard, the said motion was by the court overruled; to which ruling of the court the said defendant, by his counsel, then and there at the time said ruling was announced did in open court except, and prayed that a bill of exceptions be signed and made part of the record, which is accordingly done.

Ap'l 16, 1883.

A. P. McCORMICK,
Dist. Judge.

And thereupon the said def't, E. G. Hanrick, by his counsel, presented and urged his exceptions to said "pl't'ffs' first supplemental petition" as follows, viz:

ELIZA M. O'BRIEN *et al.*
v.
E. G. HANRICK. } No. 14.

147 Comes the defendant, E. G. Hanrick, by his counsel, and excepts to pl't'ffs' plea this day filed, styled "pl't'ffs' first supplemental petition," because—

1st. The said plea shows no right in pl't'ffs to have the relief prayed for.

2d. The pl't'ffs in said plea claim by a new and different right from that set up in their original petition.

3d. Said plea shows that pl't'ffs did not have, when this suit was brought, any legal title to the premises sued for.

4th. Said plea attempts to join an equitable action to cancel deeds outstanding in Sargent and Branch with an action at law for the possession of land brought against this defendant.

5th. The said plea in no manner connects this def't with the charges of fraud and failure of consideration alleged in said plea against said Sargent and Branch.

6th. The alleged equitable right set up in said plea is a stale demand.

7th. It does not appear by said plea by what right the pl't'ff, Wm. Brady, joins in the plea to cancel said deeds.

Where- defendant prays judgment.

148 And for answer to said plea this def't reiterates the defences set up in his answer filed April 3d, 1883.

GOODRICH & CLARKSON,
Att'ys for E. G. Hanrick.

And argument thereon having been heard by the court, the said exceptions were by the court in all things overruled; to which ruling of the court the said def't, by his counsel, did then and there, in

open court, at the time said ruling was announced, except and pray a bill of exceptions, which is granted, signed, and made part of the record.

April 16, 1883.

A. P. McCORMICK,
Dist. Judge.

149 *Defendant's 5th Bill of Exceptions.*

Endorsed, to wit: No. 14. Eliza M. O'Brien *et al. vs.* E. G. Hanrick. Bill of exceptions No. 5. Filed April 16, 1883. J. H. Finks, clerk.

Which is as follows, to wit:

In U. S. Circuit Court at Waco. Spring Term, 1883.

ELIZA M. O'BRIEN *et al.*
v.
E. G. HANRICK. } No. 14.

Be it remembered that on the trial of this cause before the jury the def't, by his counsel, for the purpose of proving an outstanding title to a portion of the land sued for by pl't'ffs superior to pl't'ffs' title, offered in evidence a deed, dated May 24, 1871, made by E. G. Hanrick to E. J. Gurley as follows, viz:

THE STATE OF TEXAS, *McLennan County:*

This memorandum of an agreement by and between Edw. G. Hanrick, sole heir of Edw. Hanrick, deceased, and Edw. J. Gurley, witnesseth that, for and in consideration of the professional
150 services rendered by said Gurley to Edw. Hanrick, deceased, and subsequently in the matter of his estate, and of the payment of all attorneys' fees and one-third of other expenses touching the lands hereinafter described, which said payments are provided for in an article of agreement of even date herewith between the parties hereto, the said Edw. G. Hanrick therein acting as the administrator of Edw. Hanrick, deceased, to which article of agreement reference is here made, which said payments said Gurley binds himself, his heirs, and legal representatives, well and truly, to make, according to the terms of said agreement, the said Edw. G. Hanrick sole heir as aforesaid of Edw. Hanrick, deceased, has bargained and sold, and by these presents does bargain, sell, and convey, to said Edw. J. Gurley the following-described land, to wit:

One undivided one-third interest in the following tracts lying and being situated in Falls county, Texas: Eleven leagues of land on the left or east bank of the Brazos river, including within its boundaries the town of Marlin, originally granted by the State of Coahuila and Texas to Atanacio de la Serda; five leagues on the right or west margin of the said river Brazos, originally granted to Pedro
151 Zarza, and one league anjoining the said five Zarza leagues on the south side thereof and at the back end thereof, originally granted to Rafael de Arguirie, and also one undivided one-third

interest in and to ten leagues lying and being situated in Williamson county, Texas, originally granted to Rafael de Arguirie. For more full and perfect description of all of said lands reference is made to the original grants archived in the gen'l land office of the State of Texas, at Austin city, to the county maps of said counties of Falls and Williamson on file in the recorders' offices of said counties, and to the records of deeds and other title papers touching said lands in the recorders' offices of said counties.

All sales of parts and parcels of said lands heretofore made by Edw. Hanrick, deceased, in his lifetime, and by Edw. G. Hanrick since his death, are hereby recognized as valid and binding, and in lieu of the lands thus sold one-third of the proceeds thereof are hereby conveyed to said Gurley, all which said Gurley, his heirs, legal representatives, and assigns shall have and hold in fee-simple forever. And I, the said Hanrick, to the s'd Gurley, do forever warrant and defend the title to said lands against the claims of
152 all persous legally claiming the same or any part thereof by, through or under me and no further.

In testimony of all which we both hereto sign our names and affix our seals, this the 24th day of May, A. D. 1871.

E. G. HANRICK. [SEAL.]
E. J. GURLEY. [SEAL.]

THE STATE OF TEXAS, *County of McLennan*:

Before me, O. H. Leland, a notary public in and for the county of McLennan, personally came E. G. Hanrick & E. J. Gurley, to me well known, by whom the foregoing and hereto-attached instrument of writing, bearing date May 24, A. D. 1871, appears to have been executed, and to me acknowledged that they executed the same for all the purposes and considerations therein stated.

To all which I certify by hereto setting my hand officially with the seal of my office, at office, this 1st day of June, A. D. 1871.

[Notarial Seal.]

O. H. LELAND,
Notary Public of McLennan County.

THE STATE OF TEXAS, *County of Falls:*

153 I, J. W. Watkins, clerk of the county court, Falls county, do hereby — that the foregoing instrument, with its certificates of authentication, was filed for record in my office Sept. 15th, 1882, at 2 p. m., and recorded same day in book R, pages 280 and -81, Falls county record of deeds.

Given under my hand and seal of office, this Sept. 15th, 1882.

[County Court Texas, Falls County.]

J. W. WATKINS,
C. C. C. F. Co.,
By C. A. BARTLETT, *D. C.*

Said defendant also called and had sworn as a witness E. J. Gurley, and offered to prove to the jury by said witness that in 1858 the deceased, Edward Hanrick, put witness in actual possession of the land

and in all and singular the above-granted and described premises, with the appurtenances, and has good rightful power and lawful authority to grant, bargain, sell, and convey the same in manner aforesaid. And that the said party of the second part, her heirs and assigns, shall and may at all time- hereafter peacefully and quietly have, hold, use, occupy, possess, and enjoy the above-granted premises and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said party of the first part, her heirs or assigns, or any other person or persons lawfully claiming or to claim the same. And that the same now are free, clear, discharged, and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and incumbrances of what nature or kind soever.

And also that the said party of the first part and her heirs and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title, or interest of, in, or to the hereinbefore-granted premises, by, from, under, or in trust for them
160 or either of them shall and will at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, her heirs and assigns, make, do, and execute, or caused to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law for the better and more effectually vesting and confirming the premises hereby granted, or so intended to be, in and to the said party of the second part, her heirs and assigns, forever, as by the said party of the second part, her heirs or assigns, or her and their counsel, learned in the law, shall be reasonably advised or required. And the said Eliza O'Brien, for herself — her heirs, the above-described and hereby granted and released premises and every part and parcel thereof, with the appurtenances, unto the said party of the second part, her heirs and assigns, against the said party of the first part and her heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

In witness whereof the said party of the first part has here-
161 unto set his hand and seal, the day and year first above written.

ELIZA O'BRIEN. [SEAL.]

Signed, sealed, and delivered in the presence of us—
[SEAL.] MARTIN O'BRIEN,
Of Tomfarney, in the County Wexford, Farmer.
FRANCIS RUTTLEDGE, *J. P.*,
Coolleawn, Amscorthy Co., Wexford.

COUNTY OF WEXFORD, IRELAND, *to wit, ss:*

On the eleventh day of May, T. R., in the year one thousand eight hundred and seventy-eight, before me personally came Elizabeth O'Brien, of Tomfarney, in the county of Wexford, Ireland, widow,

to me personally known to be the individual described in and who executed the foregoing instrument, and acknowledged that she executed the same freely and voluntarily as her act and deed for all the purposes therein mentioned, the day and year above written.

FRANCIS RUTTLEDGE,
Coolleawn, in the County of Wexford, Ireland, Ireland, *one of Her Majes-y's Justices of the Peace for said County.*

CONSULATE OF THE UNITED STATES, *Dublin, Ireland:*

162 On this thirteenth day of June, A. D. 1878, personally appeared before me, Martin O'Brien, subscribing witness to the foregoing instrument, known to me, who being by me duly sworn did depose and say: That he knew Eliza O'Brien, the individual described in and who executed the said document; that he was present and saw the said Eliza O'Brien sign, seal, and deliver the same as and for her act and deed, whereupon he, the said Martin O'Brien, became the subscribing witness thereto.

MARTIN O'BRIEN.

[SEAL.] B. H. BARROWS,
U. S. Consul.

The following endorsements appear upon the foregoing deed, to wit:

10,748. Eliza O'Brien to Eliza Mercy O'Brien, dec'd. Dated ——, 1877. Filed May 18, 1882. Chas. Rossignold, clerk, D. C., G. Co., by Edwin Price, d'y. Filed Sept. 21st, 1882. J. H. Finks, clerk, U. S. cir. c't. Book 28, pp. 330, 1, 2, 3, 4. Filed for record 6th Jan'y,
163 1879, at 12 o'clock m. J. W. Baker, clerk co. c't, McLennan Co., Texas. J. M. McClelland, att'y, &c., 12, 66th. Filed for record at 12 o'clock m., Jan'y 13, 1879. M. H. Curry, Co. clerk, Falls Co., Texas, by Geo. G. Slater, deputy. Filed for record Feb'y 18, 1879, at 10 o'clock a. m. W. W. Upsher, clerk, C. C., Bell Co. Filed for record March 22d, 1882, and recorded March 23d, 1882, at 9 o'clock a. m., in book F, records of deeds, on pages 267 to 271. Given under my hand and seal, this 23d day of March, 1882. Seal, B. F. Cameron, clerk C. C., L. Co. Filed April 5, 1879, at 11 o'clock a. m. Levi Pennington, clerk Co. C., W. county.

STATE OF TEXAS, *Falls County:*

I, M. H. Curry, clerk of the county court of Falls county, do hereby certify that the foregoing deed, with its certificates of authentication and record in McLennan county, Texas, was filed for record
164 in my office at 12 o'clock m., January 13th, 1879, and duly recorded at 5 o'clock p. m., Jan'y 13th, A. D. 1879, on pages 225, 226, 227, & 228, of book "O," of Falls county record of deeds.

Witness my hand and official seal, at my office, in the town of Marlin, this the day and year last above written.

[SEAL.] M. H. CURRY,
Co. Clerk Falls Co., Texas,
By GEO. G. SLATER, *Dep'y.*

THE STATE OF TEXAS, *County of McLennan:*

I, J. W. Baker, clerk of the county court of McLennan county, Texas, do hereby certify that the above and foregoing deed and certificate attached thereto was filed for record on the 6th day of January, A. D. 1879, at 12 o'clock m., and was recorded on McLennan county deed book No. "28," pages 330, 331, '3, '4, on 7th Jan'y, A. D. 1879, at 2 o'clock p. m.

Witness my hand and seal of said county court, at office, in Waco, this the 7th day of January, A. D. 1879.

[SEAL.] J. W. BAKER,
Clerk County Court, McLennan Co., Texas.

STATE OF TEXAS, *County of Bell:*

165 I, W. W. Upshur, clerk of the county court in and for said county, do hereby certify that the foregoing and attached deed or instrument of writing, with its certificate of authentication and certificates of record thereto attached, was filed for record in my office on 18th day of February, A. D. 1879, at 10 o'clock a. m., and was duly recorded by me in book 31 of the records of deeds, mortgages, &c., of Bell county, on pages 348, '9, 350, '1, & 352, this the 28th day of February, A. D. 1879, at 11 o'clock a. m.

Given under my hand and seal of office day and date last above written.

[SEAL.] W. W. UPSHUR,
County Clerk Bell County.
By ——— ———, *Dep'y.*

Certificate of Record.

STATE OF TEXAS, *County of Williamson:*

I, Levi Pennington, clerk of the county court in and for said county, do hereby certify that the foregoing instrument of writing, with its certificates of authentication, was filed April 5th, 1879, at 11 o'clock a. m., and was duly and correctly recorded in my office on the 29th day of April, 1879, at 8 o'clock a. m., in record book 21, pages 522 & 523, 524, 525, & 526.

166 In witness whereof I hereunto sign my name and affix the seal of said court, at office, in Georgetown, this 29th day of April, 1879.

[SEAL.] LEVI PENNINGTON,
Clerk of County Court Williamson County, Texas.
By ——— ———, *Dep'y.*

Note by the clerk: The following is certificate of the U. S. circuit court clerk attached to the foregoing deed, the original deed having been withdrawn from the files of the court by the plaintiffs and a duly certified copy left instead thereof:

UNITED STATES OF AMERICA, }
Fifth Circuit and Northern District of Texas, } *ss:*

I, J. H. Finks, clerk of the circuit court of the United States, in

and for the northern district of Texas, at Waco, do hereby certify the writing hereto annexed to be a true copy of the original deed from Eliza O'Brien to Eliza Mercy O'Brien, bearing date May the 11th day, A. D. 1878, and also a true copy of all the endorsements on the back of said deed, and also all of the certificates of authentication on said deed and attached thereto. The foregoing and attached copy of deed, endorsements, and certificates contain ten pages and four lines, the said original deed being now on file but to be withdrawn in case No. 14 of Eliza M. O'Brien *et als.*, plaintiffs, against Ed. G. Hanrick, defendant, as fully as the same remains on
167 file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of Waco, in said district, this 11th day of June, in the year of our Lord, 1883.

[SEAL.] J. H. FINKS,
Clerk of said Court.

Endorsed, to wit: No. 14. United States cir. court, northern district of Texas, at Waco. E. M. O'Brien *et als.* against E. G. Hanrick. Duly certified copy of the original deed from Eliza O'Brien to Eliza Mercy O'Brien, with endorsements, certificates, &c., attached and thereon, in the above-entitled cause. Filed April 11th, 1883, in place of *of* original, to be withdrawn by permission of the judge. J. H. Finks, clerk.

Upon the face of said deed it appeared that wherever the name of the grantor was mentioned in the body of said deed the name, as originally written, was Elizabeth O'Brien, and that a portion of said name had been scratched or erased so as to read Eliza O'Brien, of which changes no note of explanation or emendation appeared in said deed, and thereupon, when said deed was offered, def't,
168 by his counsel, objected to the introduction of said deed in evidence, because, first, the said deed had been impeached by the affidavit of Wharton Branch, a party to the record, as follows, viz:

In U. S. Circuit Court at Waco.

ELIZA M. O'BRIEN *et al.*
vs.
EDWARD G. HANRICK *et al.*
} No. 14. U. S. C't Court.

Now comes Wharton Branch, one of the defendants in said cause, and, being duly sworn, says that a certain instrument in writing, purporting to be a deed of conveyance to Eliza Mercy O'Brien, and signed Eliza O'Brien and dated May 11th, 1878, and recorded in Falls county, Texas, in book O, p-. 225, 226 & 227 & 228, has been exhibited to him, and that he does not believe said instrument was signed and executed by the same Elizabeth O'Brien who was mother to Philip O'Brien and sister to Edward Hanrick dec'd, and that, in so far as the same is represented to be and purports to be a deed from said Elizabeth O'Brien, he believes the same to be a forgery.

WHARTON BRANCH.

Signed and sworn to before me, this the 4th day of April, A. D. 1883.

Witness my hand and the seal of the court.

[SEAL.] J. H. FINKS, *Clerk.*

And because, 2d, that said deed did not purport to be the
169 deed of Elizabeth O'Brien, nor did the same purport to vest title in the grantee, Eliza M. O'Brien, to hold as her separate property, as alleged in plaintiffs' petition, and therefore constituted a variance; and, 3d, because of the unexplained changes apparent on the face of said deed. But the court admitted said deed in evidence to the jury over the objections of defendant, to which ruling of the court the def't, by his counsel, then and there excepted, and prays a bill of exceptions, which is granted, and made part of the record. Immediately after the court had made its ruling admitting said deed in evidence and before the same was actually read in evidence to the jury the pl't'ffs offered as preliminary proof to the court to prove said instrument as at common law, and H. F. Ring, Esq., was sworn, who deposed to the court that the grantor in said deed and the subscribing witnesses all reside in Ireland; that he was acquainted with the handwriting of Francis Ruttledge, one of the subscribing witnesses to said deed, and that he believed the said Francis Ruttledge to have signed the same as subscribing witness thereto. Evidence was also given to the court tending to rebut
170 said statement, and in the further progress of the case before the jury evidence was introduced before the jury, by pl't'ffs, tending to show that Elizabeth O'Brien and Eliza O'Brien was one and the same person. Evidence was also introduced, tending to rebut the alleged fact. The pl't'ffs then proposed to prove by the deposition of Philip O'Brien that no consideration was paid for said conveyance, and that the same was intended as a gift to his wife, Eliza M. O'Brien, to the admission of which testimony the defendant by his counsel objected, because the deed being upon its face, a deed for valuable consideration made to a married woman during coverture, was in law a deed to the community, and subject to the sole control and disposition of the husband, and a trust in favor of a separate right could not at law be engrafted on it by parol testimony, which objections were by the court overruled, and the said testimony admitted to the jury, to which ruling of the court the defendant by his counsel then and there excepted and prayed a bill of exceptions, which is granted, signed, and made part of the records. The above and foregoing being the substance of all the testimony
171 before the jury, in relation to said deed, the def't by his counsel requested the court to charge the jury as follows in substance, viz.:

ELIZA M. O'BRIEN *et al. vs.* E. G. HANRICK.

The defendant, E. G. Hanrick, by his counsel, requests the court to instruct the jury as follows:

The plaintiffs by their plea allege title in Elizabeth O'Brien, and in dereigning title from her, present in evidence, a deed purporting

to have been executed by Eliza O'Brien to Eliza M. O'Brien, dated on the — day of May, 1878. The genuine-ss of this deed, so far as the same is offered as the deed of Elizabeth O'Brien is put in issue by the affidavit of one of the interveners. Objeciion is also made to the erasures of a part of the name of the grantor in the body of said deed. You are charged that, to make said deed operative to convey the interest of Elizabeth O'Brien, it devolves upon the plaintiffs to prove that she, in fact, executed the same by signing her name Eliza O'Brien, and for this purpose the jury cannot consider the certificate of acknowledgment purporting to be
172 signed by Francis Ruttledge, or the certificate of proof purporting to be signed by the United States counsel, as proof of such execution, and in addition it is incumberent upon the pl't'ffs to explain to you, by proof, the erasures appearing in the body of said deed.

Now, if you are satisfied from all the proof before you (outside of the before-mentioned certificate of acknowledgment and proof) that Elizabeth O'Brien did, in fact, execute said deed by signing her name thereto Eliza O'Brien; and if you further believe from the evidence that the erasures appearing in said deed were made at or before the time the said deed was executed; if you believe it was executed, then you are authorized to find said deed to be the genuine deed of Elizabeth O'Brien; if, however, you are not satisfied from the evidence that Elizabeth O'Brien did so execute said deed, or if you are not satisfied from the evidence that said erasures were made at or before the time said deed was executed, then you will find a verdict for the defendants.

GOODRICH & CLARKSON,
Att'ys for E. G. Hanrick.

Refused.

A. P. McCORMICK, *Judge.*

173 And the defendant also requested the court to further charge the jury as follows in substance, viz:

E. M. O'BRIEN *vs.* E. G. HANRICK.

The deed to Eliza M. O'Brien from Eliza O'Brien is *prima facie* a deed to the community of Philip O'Brien & wife, and the burden of proof is on the pl't'ffs to prove to your satisfaction that the property conveyed by said deed was the separate property of Eliza M. O'Brien, and if the pl't'ffs have failed to satisfy you on this point then the property conveyed by said deed passed to Sargent and Branch under the previous deeds made by Philip O'Brien to them.

GOODRICH & CLARKSON, *Att'ys.*

Refused April 10, 1883.

A. P. McCORMICK, *Judge.*

And the interveners, Wharton Branch and John B. Sargent, by their counsel, also requested the court to instruct the jury as follows, viz:

ELIZA M. O'BRIEN *et al.*
vs.
E. G. HANRICK. } No. 14.

174 In the above-entitled and numbered cause the interveners ask the court to charge the jury:

1st. That the plaintiff must show the legal title in themselves to all or part of the land described in their petition before they are entitled to a verdict.

2. The plaintiffs must show that Eliza O'Brien, whose name is signed to the deed dated May 11th, 1878, was one of the heirs of Edward Hanrick, deceased, and entitled to the same claimed by plaintiffs' evidence outside of the deed or the recitals therein.

8. That any erasure in the deed from Eliza O'Brien to Eliza M. O'Brien unexplained are presumed to have been made after the same are executed and will make the same invalid.

4. That under the general warrant*ee* contained in the deeds executed by O'Brien for himself & wife, Eliza M. O'Brien, and as att'y-in-fact for Elizabeth O'Brien, John and James Hanrick, dated Feb'y 14, 1878, would carry with these and vest in said Branch & Sargent any title acquired by said Philip O'Brien after the making
175 and delivery of said deeds, and that the deed executed by Eliza O'Brien to Eliza M. O'Brien would vest in said Sargent & Branch the title to the full interest of Philip O'Brien & wife contained in their warranty, and plaintiffs, Eliza M. & Philip O'Brien, are estopped by the covenants of warranty & * * contained in their deeds to Sargent & Branch, dated Feb. 14, 1878.

F. BARNARD,
Att'y for Interveners.

Refused. A. P. McCORMICK, *Judge.*

But the court refused to so charge the jury as prayed by the def't and the said interveners, and refused to submit any of said issues to the jury, except only the question as to whether the said Elizabeth O'Brien and the said Eliza O'Brien are one and the same person. To which ruling of the court in refusing said charges and in refusing to instruct the jury as prayed the said def't, Hanrick, by his counsel, then and there excepted before the jury retired from the bar, and the said interveners, by their counsel, then and there
176 also excepted, and both def't and the interveners then and there prayed a bill of exceptions to said ruling, which is granted, signed, and made a part of the record.

April 16, 1883.

A. P. McCORMICK,
Dist. Judge.

177 *Def't's 7th Bill of Exceptions.*

Endorsed, to wit: No. 14. Eliza M. O'Brien *et al. vs.* E. G. Hanrick. Bill of exceptions No. 7. Filed April 16th, 1883. J. H. Finks, clerk.

Which is in words, to wit:

In U. S. Circuit Court at Waco, Texas. Spring Term, 1883.

ELIZA O'BRIEN *et al.* } No. 14.
vs.
E. G. HANRICK.

Be it remembered that upon the trial of this cause before the jury it having appeared by the pleading of the pl't'ffs and the admissions of the parties that Edward Hanrick died in the State of Alabama in 1865 unmarried and without issue; that he left surviving him the def't, E. G. Hanrick, his nephew, being a son of his deceased
178 brother, Philip Hanrick, the said nephew, E. G. Hanrick, being a native of said State of Alabama; that the said deceased, Edward Hanrick, also left surviving him two brothers, James Hanrick and John Hanrick, and one sister, Elizabeth O'Brien, all then residing in Ireland and natural-born subjects of the United Kingdom of Great Britain and Ireland, and aliens to the United States; that said John Hanrick continued to remain such subject until his death, which occurred in Ireland in 1871, unmarried and without issue; that James Hanrick also continued to remain such subject until his death, which occurred in Ireland in 1875, intestate. The said James Hanrick left surviving him five children, viz., Nicholas, Annie, & Ellen Hanrick, Elizabeth, wife of Thomas Clare, and Catharine, wife of Martin O'Neil, and five grandchildren, the children of his deceased daughter Mary, wife of Peter Whelan. That said Elizabeth O'Brien still lives in Ireland, and that at the time of the
179 death of Edward Hanrick in 1865, Nicholas Hanrick was residing in the State of New York & has continued to reside in New York. It was also proved before the jury that in May, 1870, the British Parliament, by public law, enacted as follows, viz:

(33 Vict.) Ch. 14.

CHAP. 14.

An act to amend the law relating to the legal condition of alien's and British subjects.

12th MAY, 1870.

Whereas it is expedient to amend the law relating to the legal condition of aliens and British subjects—

Be it enacted as follows:

1. This act may be cited for all purposes as "The Naturalization Act, 1870."

Status of Aliens in the United Kingdom.

2. Real and personal property, of every description, may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to
180 real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject; provided; (1) That this section shall not con-

fer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office, or for any municipal, parliamentary, or other franchise; (2) That this section shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him; (3) That this section shall not affect any estate or interest, in real or personal property, to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this act, or in pursuance of any devolution by law on the death of any person dying
181 before the passing of this act.

And it was also proved by the admission of the parties before the jury, that previous to the passing of said act the rule of the common law prevailed in said kingdom, and that under said common law aliens had no inheritable blood and could neither cast descent, inherit, or transmit real estate under the laws regulating descent in said kingdom.

And in the further progress of the cause the pl't'ffs produced in evidence before the jury a deed signed Eliza O'Brien to Eliza M. O'Brien, dated May 11th, 1878, as follows, viz:

"This indenture, made the 11th day of May, in the year one thousand eight hundred and seventy-eight, T. R,. between Eliza O'Brien, of Tomfarney, in the county of Wexford, in Ireland, widow, party of the first part, and Eliza Mercy O'Brien, the wife of Philip O'Brien, of the city of New York, in the State of New York, in the United States of America, party of the second part, witnesseth: That
182 the said party of the first part for and in consideration of the sum of one dollar, lawful money of the United States, to her in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, her heirs, executors, and administrators, forever released and discharged from the same by these presents, has granted, bargained, sold, alienated, remised, released, conveyed, and confirmed, and by these presents does grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, and to her heirs and assigns forever, all the right, title, and interest of the party of the first part of, in, and to each and all of the following tracts of land which belonged to Edward Hanrick, of Montgomery, Montgomery county, State of Alabama, U. S. A., (now deceased), or in which he had or claimed to have a right, title, or interest, all situated, lying, and being in the State of Texas, in the United States of America, namely:
183 First. A tract of forty-four thousand two hundred and eighty (44,280) acres in Williamson county.

Second. A tract of forty-four hundred and twenty-eight (4428) acres in Falls county, which two tracts of land were granted to one Rafael Aguire.

Third. A tract of twenty-one thousand four hundred and seventy-six (21,476) acres in Falls county, which tract of land was granted to one Pedro Zarza.

Fourth. A tract of forty-eight thousand and seven hundred and eight (48,708) acres in Falls county, which tract of land was granted to one Antonio de La Serda.

Fifth. A tract of forty-eight thousand seven hundred and eight (48,708) acres in Bell county, which tract of land was granted to one Miguel Davilla.

Sixth. A tract of forty-four hundred and twenty-eight (4428) acres in Liberty county, which tract of land was granted to one J. F. De Rumazor.

Seventh. A tract of twenty-two hundred and fourteen (2214) acres in Liberty county, which tract of land was granted to one Andrew Weaver.

And, also, any and all other lands in the said State of Texas
184 which belonged to the said Edward Hanrick at the time of his decease, or in which he had any right, title, or interest, the same having descended to and the title thereof became vested in the said party of the first part upon the decease of the said Edward Hanrick, the party of the first part being his sister and one of his heirs-at-law; together with all and singular the tenements, hereditaments, and appurtenances thereinto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To have and to hold the above-granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, to her and their own proper use, benefit, and behoof, forever. And the said Eliza O'Brien, for herself, her heirs, executors, and administrators, does covenant, grant, and agree to and
185 with the said party of the second part, her heirs, and assigns, that the said Eliza O'Brien, at the time of the sealing and delivery of these presents, is lawfully seized in her own right of a good, absolute, and indefeasable estate of inheritance in fee-simple of and in all and singular the above-granted and described premises, with the appurtenances, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner aforesaid; and that the said party of the second part, her heirs, and assigns shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess, and enjoy the above-granted premises and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said party of the first part, her heirs or assigns, or of any other person or persons lawfully claiming or to claim the same; and that the same now are free, clear, discharged, and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumbrances, of what nature or kind so-
186 ever, and also that the said party of the first part and her heirs and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title, or interest of, in, or to the hereinbefore-granted premises by, from, under, or in trust

for them or either of them, shall and will, at any time or times hereafter, upon the reasonably request and at the proper costs and charges in the law of the said party of the second part, her heirs, and assigns, make, do, and execute, or cause to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law for the better and more effectually vesting and confirming the premises hereby granted or so intended to be in and to the said party of the second part, her heirs, and assigns, forever, as by the said party of the second part, her heirs or assigns, or her and their counsel learned in the law shall be reasonably advised or required. And the said Eliza O'Brien, for herself, her heirs, the above-described and hereby-granted and released premises and every part and parcel thereof, with the appurtenances, unto the said party of the second part, her heirs, and assigns, against the said party of the first part and her heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

187 In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

ELIZA O'BRIEN. [SEAL.]

Signed, sealed, and delivered in the presence of us.

MARTIN O'BRIEN,
Of Tomfarney, in the County Wexford, Farmer.

[SEAL.] FRANCIS RUTTLEDGE, *J. P.*,
Coolleawn, Amscorthy Co., Wexford.

COUNTY OF WEXFORD, *Ireland,* } *To wit, ss:*

On the eleventh day of May, T. R., in the year one thousand eight hundred and seventy-eight, before me personally came Elizabeth O'Brien, of Tomfarney, in the county of Wexford, Ireland, widow, to me personally known to be the individual described in and who executed the foregoing instrument, and acknowledged that she executed the same freely and voluntarily as her act and deed for all the purposes therein mentioned, the day and year above written.

FRANCIS RUTTLEDGE,
Coolleawn, in the County of Wexford Ireland, Ireland,
One of Her Majesty's Justices of the Peace for said County.

CONSULATE OF THE UNITED STATES, *Dublin Ireland:*

On this thirteenth day of June, A. D. 1878, personally ap-
188 peared before me Martin O'Brien, subscribing witness to the foregoing instrument, known to me, who, being by me duly sworn, did depose and say: That he knew Eliza O'Brien, the individual described in and who executed the said document; that he was present and saw the said Eliza O'Brien sign, seal, and deliver

the same as and for her act and deed; whereupon he, the said Martin O'Brien became the subscribing witness thereto.

MARTIN O'BRIEN.

[SEAL.] B. H. BARROWS,
U. S. Consul.

The following endorsements appear upon the back of the foregoing deed, to wit:

10,748. Eliza O'Brien to Eliza Mercy O'Brien. Deed. Dated ———, 1877. Filed May 18, 1882. Chas. Rossignold, cl'k D. C. G. Co., by Edwin Price, d'y. Filed Sept. 21st, 1882. J. H. Finks, clerk U. S. cir. c't. Book 28, pp. 330, 1, 2, 3, 4. Filed for record 6th Jan'y, 1879, at 12 o'clock m. J. W. Baker, clerk Co. c't, McLennan Co., Texas. J. M. McClelland, att'y, &c., 12, 66th. Filed for record at 12 o'clock m., Jan'y 13, A. D. 1879. M. H. Curry, Co. clerk Falls Co., Tex., by Geo. G. Slater, deputy. Filed for record Feb'y 18, 1879, at 10 o'c'ock a. m. W. W. Upshur, clerk C. C. Bell
189 Co. Filed for record M'ch 22, 1882, and recorded March 23d, 1882, at 9 o'clock a. m., in book F, records of deeds, on pages 267 to 271. Given under my hand and seal, this 23d day of March, 1882. Seal, B. F. Cameron, clerk C. C., L. Co. Filed April 5, 1879, at 11 o'clock a. m. Levi Pennington, clerk Co. C., W. county.

STATE OF TEXAS, *Falls County:*

I, M. H. Curry, clerk of the county court of Falls county, do hereby certify that the foregoing deed, with its certificates of authentication and record in McLennan county, Texas, was filed for record in my office, at 12 o'clock m., January 13th, 1879, and duly recorded at 5 o'clock p. m., Jan'y 13, A. D. 1879, on pages 225, 226, 227, & 228 of book "O" of Falls county record of deeds.

Witness my hand and official seal, at my office in the town of Marlin, this the day and year last above written.

[SEAL.] M. H. CURRY,
Co. Clerk Falls County, Texas.
By GEO. G. SLATER, *Dep'y.*

THE STATE OF TEXAS, *County of McLennan:*

I, J. W. Baker, clerk of the county court of McLennan county, Texas, do hereby certify that the above and foregoing deed and certificate attached thereto was filed for record on the 6th day of January, A. D. 1879, at 12 o'clock m., and was recorded on McLennan county deed book No "28," pages 330, 331, 2, 3, & 4, on 7th January, A. D. 1879, at 2 o'clock p. m.

190 Given under my hand and seal of said county court, at office in Waco, this the 7th day of January, A. D. 1879.

[SEAL.] J. W. BAKER,
Clerk County Court McLennan Co., Texas.

STATE OF TEXAS, *County of Bell:*

I, W. W. Upshur, clerk of the county court in and for said county, do hereby certify that the foregoing and attached deed or instru-

ment of writing, with its certificate of authentication & certificates of record thereto attached, was filed for record in my office on 18th day of February, A. D. 1879, at 10 o'clock a. m., and was duly recorded by me in book 31 of the records of deeds, mortgages, &c., of Bell county, on pages 348, 9, 350, 1, & 352, this the 28th day of Feb'y, A. D. 1879, at 11 o'clock a. m.

Given under my hand and seal of office, day and date last above written.

W. W. UPSHUR,
County Clerk Bell Co.
By —— ——, *Dep'y.*

Certificate of Record.

STATE OF TEXAS, *County of Williamson:*

I, Levi Pennington, clerk of the county court in and for said county, do hereby certify that the foregoing instrument of
191 writing, with its certificates of authentication, was filed April 5th, 1879, at 11 o'clock a. m., and was duly and correctly recorded in my office on the 29th day of April, 1879, at 8 o'clock a. m., in record book 21, pages 522 & 523, 524, 525, & 526.

In witness whereof, I hereunto sign my name and affix the seal of said court, at office in Georgetown, this 29th day of April, 1879.

[SEAL.] LEVI PENNINGTON,
Clerk of County Court, Williamson County, Texas,
By —— —— *Dep'y.*

Note by the clerk: The original deed having been withdrawn from the files of the court by the plaintiffs with permission of the judge thereof. The following is the clerk's certificate to copy of said deed filed instead thereof, viz:

UNITED STATES OF AMERICA, }
Fifth Circuit and Northern District of Texas, } *ss:*

I, Jno. H. Fink, clerk of the circuit court of the United States in and for the northern district of Texas, at Waco, do hereby certify the writing hereto annexed to be a true copy of the original deed from Eliza O'Brien to Eliza Mercy O'Brien, bearing date May, the 11th day, A. D. 1878, and also a true copy of all the endorsements on the back of said deed, and also all of the certificates of
192 authentication on said deed, and attached thereto. The foregoing and attached copy of deed, endorsements, and certificates contain ten pages and four lines, the said original deed being now on file, but to be withdrawn in case No. 14 of Eliza M. O'Brien *et al.*, plaintiffs, against Ed. G. Hanrick, defendant, as fully as the same remains on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in city of Waco, in said district, this 11th day of June, in the year of our Lord 1883.

[SEAL.] J. H. FINKS,
Clerk of said Court.

Certificate endorsed, to wit: No. 14. United States circuit court, northern district of Texas, at Waco. E. M. O'Brien *et als. vs.* E. G. Hanrick. Duly certified copy of the original deed from Eliza O'Brien to Eliza Mercy O'Brien, with endorsements, certificates, &c., attached and thereon, in the above-entitled cause. Filed April 11th, 1883, in place of original, to be withdrawn by permission of the judge. J. H. Finks, clerk.

Plaintiffs also produced in evidence a deed signed by Philip O'Brien and Eliza M. O'Brien to William Brady, dated Nov. 27th, 1878, as follows, viz:

193 *Warrantee Deed.*

This indenture, made the twenty-seventh day of November, in the year one thousand eight hundred and seventy-eight, between Eliza M. O'Brien, wife of Philip O'Brien, of the city of Boston and State of Massachusetts, and said Philip O'Brien, parties of the first part, and William Brady, of the city, county, and State of New York, party of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of ten dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs, executors, and administrators, forever released and discharged from the same, by these presents have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all the undivided one-half interest of any equity of title that we may have or acquire in and to the following described tracts, pieces, or
194 parcels of land situate, lying, and being in the State of Texas, in the United States of America, vizt:

First. A tract of forty-four thousand two hundred and eighty (44,280) acres in Williamson county.

Second. A tract of forty-four hundred and twenty-eight (4,428) acres in Falls county, which two tracts of land were granted to one Rafael Aguine.

Third. A tract of twenty-one thousand four hundred and seventy-six (21,476) acres in Falls county, which tract of land was granted to one Pedro Zarza.

Fourth. A tract of forty-eight thousand seven hundred and eight (48,708) acres in Falls county, which tract of land was granted to one Antonio De La Serda.

Fifth. A tract of forty-eight thousand seven hundred and eight (48,708) acres in Bell county, which tract of land was granted to one Miguel Davilla.

Sixth. A tract of forty-four hundred and twenty-eight (4,428) acres in Liberty county, which tract of land was granted to one J. F. De Rumazor.

Seventh. A tract of twenty-two hundred and fourteen (2,214)

acres in Liberty county, which tract of land was granted to one Andrew Weaver.

And also an undivided one-half interest of any interest
195 which the parties of the first [part] have or may acquire in and to any other land in the State of Texas. And being the same premises which were conveyed to the said Eliza M. O'Brien, one of the parties hereto of the first part, by three certain deeds, one thereof bearing date the third day of April, one thousand eight hundred and seventy-eight, made and executed by Honora Hanrick, spinster, of Brooklyn, Kings county, State of New York, daughter of James Hanrick of Touranine, county of Wexford, Ireland, deceased; another thereof bearing date the said third day of April, 1878, executed by Ellen Hanrick, spinster, of the city, county, and State of New York, daughter of James Hanrick of Tarnanine, county of Wexford, Ireland, deceased; another thereof bearing date the eleventh day of May, one thousand eight hundred and seventy-eight, and executed by Eliza O'Brien of Tomfarney, in the county of Wexford, Ireland, widow; said recited interest or title hereby intended to be conveyed being one-half of such as has or may accrue to said parties of the first part under the foregoing recited
196 deeds of conveyance thereof, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also, all the estate, right, title, interest, curtesy and right of curtesy, property, possession, claim, and demand whatsoever, as well in law as in equity of the said parties of the first part of, in, and to the same, and every part and parcel thereof, with the appurtenances: to have and to hold the above granted, bargained, and described premises, with the appurtenances unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever. And the said parties of the first part for themselves, their heirs, executors, and administrators do covenant, grant, and agree to and with the said party of the second part, his heirs and assigns, that the said Eliza M. O'Brien at the time of the sealing and delivery of these presents is lawfully seized in her own right of a good, absolute and indefeaseable estate of inheritance in fee-simple of and in all and singular the above granted, bargained, and described premises with the appurtenances and has good right, full power and
197 lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid. And that the said party of the second part, his heirs and assigns, shall and may, at all times thereafter, peaceably and quietly, have, hold, use, occupy, possess, and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said parties of the first part, their heirs or assigs, or any other person or persons, lawfully claiming or to claim the same. And also, that the said parties of the first part, and their heirs, and all and every other person or persons whatsoever, lawfully or equitably deriving any estate, right, title, or

interest of, in or to the hereinbefore granted premises, by, from, under, or in trust for them or either of them, shall and will, at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and assigns, make, do, and execute, or cause or procure to be made, done, and executed, all and every, such further and other lawful and reasonable acts, conveyances, and assurances in the law for the better and more effectually vesting and
198 confirming the premises hereby intended to be granted in and to the said party of the second part, his heirs and assigns, forever, as by the said party of the second part, his heirs or assigns, or his counsel, learned in the law, shall be reasonably devised, advised, or required. And the said parties of the first part, and their heirs, as against their equities or title in or to the above described, and hereby granted and released premises, and every part and parcel thereof, with the appurtenances unto the said party of the second part, his heirs and assigns, against the said parties of the first part, and their heirs, and against all and every person or persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

ELIZA MERCY O'BRIEN. [SEAL.]
PHILIP O'BRIEN. [SEAL.]

Sealed and delivered in the presence of—the words "one-half of" on first page, last line but one, interlined, and the words from "and to and" on second page, stricken out prior to execution—

DUNCAN CAMERON.
EDWIN F. COREY.

199 STATE OF NEW YORK, } ss:
City and County of New York, }

Before me, Edwin F. Corey, a commissioner of deeds for the State of Texas resident in the city and county of New York, personally appeared Eliza M. O'Brien, wife of Philip O'Brien, and the said Philip O'Brien, the parties to the foregoing deed bearing date on the twenty-seventh day of November, one thousand eight hundred and seventy-eight, and the said Eliza M. O'Brien having been examined by me privily and apart from her husband, and having the said deed fully explained to her, she, the said Eliza M. O'Brien, acknowledged the same to be her act and deed, and declared that she did willingly sign, seal, and deliver the same for the uses and purposes therein mentioned, and that she wished not to retract it. And the said Philip O'Brien acknowledged to me that he signed, sealed, and delivered the said deed for the uses and purposes therein mentioned.

To certify which I hereto sign my name and affix my official seal twenty-seventh day of November, A. D. 1878.

[SEAL.] EDWIN F. COREY,
Commissioner for the State of Texas,
No. 54 Wall Street, New York City.

The following endorsements and certificates are attached
200 and appear upon the back of the foregoing deed, to wit:

10,748. Eliza M. O'Brien and Philip O'Brien to William Brady. Deed, dated November, 1878. W. A. W. Stuart, counsellor-at-law, 49 Wall street, N. Y. Filed May 18, 1882. Chas. Rossignold, clerk D. D. G. Co., by Edwin Price, d'y. Filed Sept. 21, 1883. J. H. Finks, clerk. Book "28," 338 to 342, inclusive. Filed for record 6th Jan'y, 1879, at 12 o'clock m. J. W. Baker, clerk co. c't McLennan co., Texas. Filed for record M'ch 21st, 1882, and recorded March 22d, 1882, at 1 o'clock p. m., in book F, records of deeds, on pages 271 to 276. Given under my hand and seal, this 22d day of March, 1882. [L. S.] B. F. Cameron, clerk C. C. L. co. Filed April 5, 1879, at 11 o'clock a. m. Levi Pennington, clerk C. C. W. county. Filed for record at 12 o'clock m., Jan'y 14, 1879. M. H. Curry, co. clerk Falls co., Texas, by Geo. G. Slater, dep'ty. Filed for record Feb'y 18, 1879, at 10 o'clock a. m. W. W. Upshur, clerk C. C. Bell Co.

201 STATE OF TEXAS, *Falls County:*

I, M. H. Curry, clerk of county court of Falls Co., do hereby certify that the foregoing deed, dated Nov. 27, 1878, with the certificate of authentication and certificate of record in McLennan county attached, was filed for record in my office at 12 o'clock m., Jan'y 13, 1879, and duly recorded at 2 o'clock p. m., Jan'y 14, 1879, on pages 232, 233, 234, 235, & 236 of book "O," Falls county records of deeds.

Witness my official signature and seal, at my office in Marlin, Texas, this the day & year last above written,

[SEAL.] M. H. CURRY,
County Clerk of Falls County, Texas.
By GEO. G. SLATER, *Deputy.*

THE STATE OF TEXAS, *County of McLennan:*

I, J. W. Baker, clerk of the county court of McLennan county, Texas, do hereby certify that the above and foregoing deed and certificate attached thereto was filed for record on the 6th day of Jan'y, A. D. 1879, at 12 o'clock m., and was recorded on McLennan county deed book No. "28," pages 338, 339, 340, 341, & 342, on 8th January, A. D. 1879, at 2½ o'clock p. m.

Given under my hand and seal of said county court, at
202 office in Waco, this 8th day of January, A. D. 1879.

[SEAL.] J. W. BAKER,
Clerk County Court, McLennan Co., Texas.
By ——— ———, *Dep'ty.*

THE STATE OF TEXAS, *County of Bell:*

I, W. W. Upshur, clerk of the county court in and for said county, do hereby certify that the foregoing and attached deed or instrument of writing, with its certificate of authentication and certificates of record thereto attached, was filed for record in my office on 8th day of February, A. D. 1879, at 10 o'clock a. m., and was duly recorded by me in book 31 of the records of deeds, mortgages, etc., of

Bell county, on pages 356, 7, 9, & 360, this the 1st day of March, A. D. 1879, at 11 o'clock a. m.

Given under my hand and the seal of office day and date last above written.

W. W. UPSHUR,
County Clerk Bell County.
By ——— ———, *Dep'y.*

Certificate of Record.

STATE OF TEXAS, *County of Williamson:*

I, Levi Pennington, clerk of the county court in and for said county, do hereby certify that the foregoing instrument of writing, with its certificates of authentication, was filed April 5, 1879, at 11 a. m. and was duly and correctly recorded in my office on the 29th day of April, 1879, at 4 o'clock p. m., in record book 21, pages
203 530, 531, 532, 533, & 534.

In witness whereof, I hereunto sign my name and affix the seal of said court, at office in Georgetown, this 29th day of April, 1879.

[L. S.] LEVI PENNINGTON,
Clerk of County Court, Williamson County, Texas,
By ——— ———, *Dep'y.*

Note by clerk: The original deed having been withdrawn from the files of the court by the plaintiffs, the following is the clerk's certificate to copy left on files instead of original:

UNITED STATES OF AMERICA, } *ss:*
Fifth Circuit and Northern District of Texas, }

I, Jno. H. Finks, clerk of the circuit court of the United States, in and for the northern district of Texas, at Waco, do hereby certify the writing hereto annexed to be a true copy of the original deed from Eliza M. O'Brien and Philip O'Brien to William Brady, dated November the 27th, 1878, and also of all the endorsements on the back of said deed, and also all of the certificates of authentication on said deed and attached to same, the foregoing deed, endorsements, and certificates being ten pages and four lines; the said deed being now on file but to be withdrawn in case No. 14 of Eliza M. O'Brien *et als.*, plaintiffs, against E. G. Hanrick, defendant,
204 as fully as the same remains on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of Waco, in said district, this 11th day of June, in the year of our Lord, 1883.

[SEAL.] J. H. FINKS,
Clerk of said Court.

Endorsed, to wit: No. 14. United States circuit court, northern district of Texas, at Waco. E. M. O'Brien *et als.* against Ed. G. Hanrick. Duly certified copy of the original deed from E. M. O'Brien and Philip O'Brien to Wm. Brady, with certificates, &c., in the

above-entitled cause. Filed June 11th, 1883, in place of original to be withdrawn from files by permission of the judge. J. H. Finks, clerk.

The pl't'ffs offered testimony tending to prove that Elizabeth O'Brien was sometimes called Eliza O'Brien and sometimes signed her name Eliza O'Brien.

Philip O'Brien also testified that said deed was intended as a gift to his wife, Eliza M. O'Brien, and that no consideration was paid for said conveyance.

205 Thereupon the plaintiffs rested and the def't, E. G. Hanrick, by his counsel, produced in evidence the following deeds before the jury, viz:

1. Land office copy of grant to T. J. Chambers, dated April, 1832, for five leagues of land.

2. A second grant of five leagues of land to T. J. Chambers, dated July, 1834, both of said grants being by the Government of Coahula and Texas.

3. Transcript from the proceedings of the probate court of Galveston county in the matter of the estate of T. J. Chambers, deceased, requiring J. D. Oltorf, administrator of said estate, to sell all the remaining interest of said estate in the aforesaid grants, so far as they conflict with the Atanacio De La Serda grant; also a report of sale to George E. Lane, and a confirmation of said sale by said court.

4. A deed by said administrator to said George E. Lane, dated Jan. 3, 1877, in accordance with said orders.

5. A deed by George E. Lane to the def't, E. G. Hanrick, dated Febr'y 1, 1877, as follows, viz:

THE STATE OF TEXAS, *Falls County:*

206 Whereas by virtue of a deed executed and delivered to me, George E. Lane, by J. D. Oltorf, as administrator of the estate of T. J. Chambers, deceased, dated on the 3d day of January, A. D. 1877. I acquired all the right, title and interest of the said estate in and to all that part of two certain surveys of land lying on the east side of the Brazos river, in Falls county, each containing five leagues and granted to said T. J. Chambers, so far as the same conflicts with the Atonacio De La Serda grant, and not before the date of my said deed conveyed by the said Chambers in his lifetime, or by his administratrix since his death, estimated to contain an area of about 12,000 acres of land; and whereas E. G. Hanrick claims to own said land under the said La Serda title, and in compromise and full settlement of the pending litigation has conveyed to me two thousond eight hundred and eighty-eight acres of said 12,000 acres, as is fully shown by his deed of this date, which said deed is here referred to in explanation of this:

Now, therefore, in consideration of the said conveyance and the facts hereinbefore as-erted, I, George E. Lane, have granted,
207 bargained, sold, and conveyed by way of quit-claim and by these presents do grant, bargain, sell, and forever quit-claim unto the said E. G. Hanrick all that part of the before-mentioned tract of about 12,000 acres, save and except the said tract of two

thousand eight hundred and eighty-eight acres described in the deed of said Hanrick to me of this date, and saving and excepting also the Marlin town tract of six hundred and forty acres, which I hereby reserve for the benefit of said town, together with all and singular the rights, members, hereditaments, and appurtenances thereunto belonging or in anywise incident to or appertaining: to have and to hold all and singular said premises unto him, said E. G. Hanrick, his heirs and assigns, forever, in fee-simple.

Witness my hand, at Marlin, this 1st day of February, 1877.

GEO. E. LANE.

Witness:

L. W. GOODRICH.
B. W. RIMES.

THE STATE OF TEXAS, *County of Falls:*

Before me, M. H. Curry, clerk of the county court in and for said county, personally appeared Geo. E. Lane, who is to me
208 known, and acknowledged that he signed, executed, and delivered the foregoing instrument for the purposes and considerations therein expressed.

Witness my official seal and signature, at my office, in the town of Marlin, this 1st day of February, 1877.

M. H. CURRY,
Clerk of the County C., Falls Co.

Filed for record 1st day of February, A. D. 1877, and recorded 2d day of same month and year.

M. H. CURRY, *Clerk C. C.*,
Per J. SCRUGGS, *Dep'y.*

THE STATE OF TEXAS, *County of Falls:*

I, J. W. Watkins, clerk of the county court, Falls county, hereby certify that the foregoing is a true and correct copy of a deed from Geo. E. Lane to E. G. Hanrick, as the same appear of record in my office in book M, pages 466, Falls county record of deeds.

Given under my hand and seal of office, this April 24th, A. D. 1882.

[SEAL.] J. W. WATKINS, *Cl'k*,
By C. H. BARTLETT, *D. C.*

The defendant, E. G. Hanrick, by his counsel, then pro-
209 duced evidence before the jury proving that said Chambers' grants conflict with the Atanacio De La Serda grant, and defining the boundaries of said conflict, and that the part of said conflict conveyed by said deed of George E. Lane to the def't, E. G. Hanrick, was about 9,400 acres.

6. A general power of attorney, dated May 16, 1870, by James Hanrick, John Hanrick, and Elizabeth O'Brien to Philip O'Brien, as follows, viz:

To all to whom these presents shall come: We, James Hanrick and

John Hanrick, both of Tomanine, farmers, and Elizabeth O'Brien, of Tomfarney, widow, all in the county of Wexford, send greeting:

Whereas Edward Hanrick, late of Montgomery, in the State of Alabama, United States of North America, lately died intestate, unmarried and without issue, and whereas we the undersigned, James Hanrick, John Hanrick, and Elizabeth O'Brien, are respectively the brothers and sister of the said Edward Hanrick; and whereas we, the said James Hanrick, John Hanrick, and Elizabeth O'Brien, in our own right and in virtue of the laws and customs of the said United States of North America, are respectively now legally entitled to a distributive share of the estate &
210 effects of the said Edward Hanrick, deceased: Now know ye that we, the said James Hanrick, John Hanrick, and Elizabeth O'Brien, having and reposing great confidence in Mr. Philip O'Brien, of number forty-one North Pearl street, Albany, in the State of New York, merchant clerk, have made, ordained, constituted, and appointed, and by these presents do make, ordain, constitute, and appoint, the said Philip O'Brien our true and lawful attorney, and do hereby grant to him full power & authority, for us and in our names and to our use, to ask, demand, sue for, and by all lawful ways and means to recover and receive from Edward G. Hanrick, or of and from the administrator of the said Edward Hanrick, and of and from all the other *other* person or persons whomsoever, all our distributive share or shares of the estate and effects of the said Edward Hanrick, which we are by law entitled unto, and all other sum or sums of money, goods, chattels, and effects, which, by the said Edward Hanrick dying intestate, or on any other account, belonging or of right ought to belong to us, and on receipt or recovery thereof, or of any part thereof, to sign and give a good and effectual receipt for the same, and also to recover of and from the said
211 Edward G. Hanrick, or of and from the administrator or legal personal representative of the said Edward Hanrick, deceased, or of and from all tenants, occupiers, and possessors of all or any of the lands, messuages, real or chattel estate and estates of the said Edward Hanrick, whatsoever and wheresoever, all and singular, our distributive share or shares of the messuages or tenaments, lands, hereditaments or other, the real or chattel estate, or estate whatsoever, and wherein the said intestate, Edward Hanrick, at the time of his decease, had any estate, term, right, or interest whatsoever, and all and singular, the appurtenances thereunto belonging, and for us, and in our names, into or upon all or any part thereof, or the names of the whole to enter and become thereof possessed, and to keep and retain possession for our use and benefit, or to sell, let, or absolutely dispose of our distributive share of and in the same, or to join and concur in the letting, sale, or disposition of the same messuages or tenements, lands, hereditaments or other real or chattel estates, with their appurtenances, at such time or times, and in such manner as he shall think proper or expedient, and to do all such acts a- to take such proceedings and
212 use all such lawful ways and means as he shall deem necessary to assert and establish our right to all and any part of

such lands, real or chattels, estates, and also for and on behalf and in the names of us, and as our acts and deed, to make, sign, seal, execute, and deliver all such agreements, contracts, leases, conveyances, and assurances, with all usual and reasonable covenants therein, on our part, of all and any part of said messuages, tenements, premises, estate, and effects as shall be found necessary or expedient, and to receive and take our share or shares of the purchase moneys or other considerations, for such part thereof as shall be sold, and the rents and profits have accrued or shall hereafter accrue or become due for such parts thereof as have been or shall be set or let to and for our use, and, in our names, to give and sign proper receipts for the same respectively, and also for us and in our names, to call for, examine, settle, adjust, and sign all accounts now depending, and which may hereafter depend between us and any other person or persons whomsoever, in relation to or in respect of the assets, real and personal estate and effects of the said Edward Hanrick,
213 deceased, and to commence and prosecute any action, suit, or other proceedings at law or in equity, against any person or persons, in respect of any of the matters or things aforesaid, and to appear to or defend any action, suits, or other proceeding to be commenced against us, and to proceed to judgment or execution or become non-suit or suffer judgment to go by default in any such action, suits, or other proceedings, or to compromise the same, as to our said attorney shall seem most expedient, and also to do, perform, and execute all such other acts, matters, or things whatsoever, as shall or may be requisite or necessary, in or about the premises, as fully and effectually as we could have done if personally present, and also to substitute or appoint any person or persons to act under or in place of him, our said attorney, and for all or any of the matters or purposes aforesaid, and every such substitution at pleasure to revoke, hereby ratifying and confirming and agreeing to ratify and confirm whatever our said attorney or his substitute or substitutes shall lawfully do or cause to be done in and about the prem-
214 ises by virtue of these presents, and we do hereby revoke all former *persons* or letters of attorney, given by us in respect of any of the matters or things, either to Henry C. Semple, of Montgomery, in the State of Alabama, Esquire, attorney-at-law, or to any other person or persons whomsoever.

In witness whereof we have hereunto subscribed our names and affix our seals, this sixteenth day of May, one thousand eight hundred and seventy.

JAMES HANRICK. [SEAL.]
JOHN HANRICK. [SEAL.]
ELIZABETH O'BRIEN. [SEAL.]

Signed and delivered in presence of—
JOHN KEHOE.
CATHARINE MURPHY.

COUNTY OF WEXFORD, IRELAND, *To wit:*

We, John Kehoe, of Tomanine, farmer, aged upwards of sixty-

four years, and Catharine Murphy, of Yrange, spinster and farmer, aged upwards of seventy-nine years, both in the county of Wexford, severally make oath and say: That we were well acquainted with Edward Hanrick, late of Montgomery, in the State of Alabama, United States of North America, deceased, in the foregoing power of attorney named and described, for some years previous to his emigation to America; that he was the lawful son of Nicholas and Honor Hanrick, his wife, with
215 both of whom we were also well acquainted; that the said Nicholas Hanrick died about the year 1816, leaving the said Honor Hanrick his widow, and the said Edward Hanrick, James Hanrick, Mercy Hanrick, John Hanrick, Elizabeth Hanrick, and Phillip Hanrick his lawful children by the said Honor Hanrick, him surviving, & that the said Nicholas & Honor had no other children who obtained age of twenty-one years or married; that the said Honor Hanrick died about the year 1845 a widow, without having intermarried with any other person after the decease of the said Nickolas Hanrick; that in the year 1816, and shortly previous to the death of the said Nicholas Hanrick, his son, the said Edward Hanrick, emigrated to America; that the said Edward Hanrick returned from America in or about the year 1829, and resided with his brother, the said James Hanrick, at Tamanine aforesaid for ten days thereabouts, during which time we frequently saw and conversed with the said Edward Hanrick, and then understood & believed she resided at Montgomery aforesaid; that we have known for fifty-five years and upwards, and we are well acquainted
216 with James Hanrick & John Hanrick, both of Tomanine aforesaid, and Elizabeth O'Brien otherwise Hanrick of Tomfarney, widow of Martin O'Brien, the constituents in the foregoing power of attorney, and we say that said James, John, & Elizabeth are the lawful children of said Nickolas Hanrick & Honor Hanrick, and the brothers and sister, respectively, of the said Edward Hanrick, deceased, & they have respectively attained the age of twenty-one years & upwards; that we knew said Phillip Hanrick and Mercy Hanrick, who were respectively the son and daughter of said Nickolas and Honor, & the brother & sister of the said Edward Hanrick, deceased; that the said Phillip Hanrick emigrated to America in or about the year 1829, and died in New Orleans, about sixteen years since, as we have heard and believe; that the said, Mercy Hanrick intermarried with Lawrence Kelly of Lower Leskin in the county of Carlow, and died about twenty years since, without leaving any child or children, her surviving. And we, the said John Kehoe and Catharine Murphy, further say that we are subscribing witnesses to the foregoing power of attorney; and that we were
217 present and saw the said James Hanrick, John Hanrick, and Elizabeth O'Brien, respectively duly sign, seal, and execute the same power of attorney in presence of us, and that we thereupon respectively subscribed our names as witnesses thereto, in presence of the said James Hanrick, John Hanrick, and Elizabeth O'Brien, and of each other, and I, the said John Kehoe, for myself, say that the name John Kehoe, subscribed as a witnes to the foregoing power of

attorney, is my proper name and handwriting, and that I have no interest in the foregoing power of attorney or matters therein referred to; & I, the said Chatharine Murphy, for myself, say that the name Catharine Murphy, subscribed as a witness to the foregoing power of attorney, is my proper name and handwriting, and that I have no interest in the foregoing power of attorney or matters therein referred to.

JOHN KEHOE.
CATHARINE MURPHY.

Personally appeared the above named John Kehoe and Catharine Murphy, both to me well known, and respectively subscribed and made oath to the foregoing affidavit, on the 16th day of May,
218 A. D. one thousand eight hundred and seventy, before me, one of Her Majesty's justices of the peace in and for said county of Wexford, at Coalbawn, in the county of Wexford aforesaid, and I further testify that the contents of the foregoing affidavit were first made known by me to each of them, the said deponents, John Kehoe and Catharine Murphy, before signing.

FRANCIS RUTELEDGE, *J. P.*

UNITED STATES CONSULATE, 18 *May*, 1870.

I, Jasper Wm. Walsh, consular agent of the United States at Wexford, Ireland, do hereby certify that the signature of Francis Ruteledge attached to the foregoing affidavit, is the true and genuine signature of the said Francis Ruteledge, and as such is worthy of full faith and credit, and I further certify that the said Francis Ruteledge is one of Her Majesty's justices of the peace for the county of Wexford, and as such is entitled to administer oaths, take affidavits, affirmations, &c.

In witness whereof, I have hereunto set my hand and affixed the seal of the Consulate at Wexford, on the day and year last above written.

JASP. W. WALSH.

219 Filed April 16th, 1881, at 8 a. m., and recorded same day at 10 a. m.

J. W. WATKINS,
C. C. C. F. C.
Per C. H. BARTLETT, *Dep'ty.*

THE STATE OF TEXAS, *County of Falls:*

I, J. W. Watkins, clerk of the county court Falls county, do hereby certify that the foregoing 9 pages is a true and correct copy of a power of attorney from James and John Hanrick and Elizabeth O'Brien to Philip O'Brien as the same appears of record in my office in book Q, pages 90, 91, 92, 93, 94, 95, & 96, Falls Co. Record of Deeds.

Given under my hand and seal of office, this Dec. 30th, 1882.

[SEAL.] J. W. WATKINS, *Clerk,*
By C. H. BARTLETT, *D. C.*

7. Deed of James Hanrick, John Hanrick, and Elizabeth O'Brien, by their attorney-in-fact, Philip O'Brien, to William Jenkins, Jr., dated Feb. 1, 1878, as follows, viz:

Know all men by these presents that we, James Hanrick, John Hanrick, and Elizabeth O'Brien, all of the county Wexford, Ireland, in consideration of one dollar & other valuable considerations paid by William Jenkins, Jr., of Boston, in the county of Suffolk and Commonwealth of Massachusetts, the receipt whereof is hereby
220 acknowledged, do hereby give, grant, bargain, sell, and convey unto the said William Jenkins, Jr., his heirs and assigns, all the right, title, and interest which we, or any of us, have in or to the following described tracts of land situated in the State of Texas which belonged to Edward Hanrick, late of Montgomery, Montgomery county, State of Alabama, dec'd, A. D. 1865, or which he had or claimed to have a right, title, and interest, and known and described as folows, to wit:

1st. First. A tract of forty-four thousand two hundred and eighty (44,280) acres in Williamson county, originally granted to Rafael Aguire.

2d. Second. A tract of forty-four hundred and twenty-eight (4,428) acres in Falls county, which two tracts of land were granted to Rafael Aguirie.

3d. Third. A tract of twenty-one thousand four hundred and seventy-six (21,476) acres in Falls county; which tract of land was granted to one Pedro Zarza.

4th. Fourth. A tract of forty-eight thousand seven hundred and eight (48,708) acres in Falls county, which tract of land was granted to one Antonio de la Serda.

5th. Fifth. A tract of forty-eight thousand seven hundred and eight acres in Milam county, which said tract of land was granted to one Miguel Davilla.

221 6th. Sixth. A tract of forty-four hundred and twenty-eight (4,428) — in Liberty county, which tract of land was granted to one J. F. De Rumazor.

7th. Seventh. A tract of twenty-two hundred and fourteen (2,214) acres in Liberty county, which tract of land was granted to one Andrew Weaver.

And also any interest which we or any of us have or may have in or to any other land in the said State of Texas by reason or virtue of our being heirs of the said Edward Hanrick, dec'd: To have and to hold the granted premises, with all the privaledges and appurtenances thereto belonging, to the said William Jenkins, Jr., & his heirs and assigns, to their own — and behoof, forever.

We do hereby, for ourselves, and our heirs, executors, and administrators, covenant with the said grantee, and his heirs and assigns, that we are lawfully seized of an interest in fee-simple of the granted premises aforesaid; that they are free from all incumbrances by us incurred; that we have good right to sell and convey the same as aforesaid, and that we will, and our heirs, executors, and administrators shall, warrant and defend the same to the said grantee
222 & his heirs and assigns forever against the lawful claims and demands of all persons.

In witness whereof we, the said James Hanrick, John Hanrick, & Elizabeth O'Brien, hereunto set our hands and seals, this 1st day of February, in the year one thousand eight hundred and seventy-eight.

JAMES HANRICK, [SEAL.]
JOHN HANRICK, [SEAL.]
ELIZABETH O'BRIEN,
By PHILIP O'BRIEN,
Their Attorney-in-Fact.

Signed and sealed in presence of—
EDWARD J. JONES.
FANNIE J. SARGFNT.

COMMONWEALTH OF MASSACHUSETTS, } ss:
County of Suffolk, City of Boston, }

Be it remembered that I, Edward J. Jones, a commissioner for the State of Texas, residing in the city of Boston, in the county of Suffolk, and Commonwealth of Massachusetts, duly appointed, commissioned, and authorized by his excelleney the Governor of the State of Texas to take the acknowledgment and proof of the execution of deeds and other instruments in writing, under seal or not, to be used or recorded in said State of Texas, and to take depositions, to administer oaths & affirmations, &c., do hereby certify that on the second day of February, in the year one thousand eight hundred and seventy-eight, in the city of Boston,
223 in the county of Suffolk aforesaid, personally appeared before me Philip O'Brien, of said Boston, as attorney-in-fact for James Hanrick, John Hanrick, & Elizabeth O'Brien, named as grantors in the annexed deed, known to me to be the individual described in, and who did then and there in my presence execute the annexed deed as said attorney-in-fact of said grantors, and after a full explanation of the contents, force, nature, & effect of said deed by me, he acknowledged to me that he had, understandingly, freely, and voluntarily, executed the said deed for all the uses & purposes therein expressed; and the said Philip O'Brien further acknowledged and declared to me that he, as said attorney-in-fact of said grantors, does not wish to retract his execution of said deed, & desired that it might be received by the grantee, and of right to be recorded, — to the laws of the State of Texas.

In witness whereof, I have hereunto set my hand and official seal, at said city of Boston, in the county & Commonwealth aforesaid, this second day of February, in the year of our Lord one thousand eight hundred & seventy-eight.

EDWARD J. JONES,
A Commissioner for the State of Texas.

Filed May 26th, 1882, at 10 a. m., and recorded same day.
J. W. WATKINS,
C. C. C. F. Co.
By C. H. BARTLETT, *D. C.*

7. Deed of James Hanrick, John Hanrick, and Elizabeth O'Brien, by their attorney-in-fact, Philip O'Brien, to William Jenkins, Jr., dated Feb. 1, 1878, as follows, viz:

Know all men by these presents that we, James Hanrick, John Hanrick, and Elizabeth O'Brien, all of the county Wexford, Ireland, in consideration of one dollar & other valuable considerations paid by William Jenkins, Jr., of Boston, in the county of Suffolk and Commonwealth of Massachusetts, the receipt whereof is hereby
220 acknowledged, do hereby give, grant, bargain, sell, and convey unto the said William Jenkins, Jr., his heirs and assigns, all the right, title, and interest which we, or any of us, have in or to the following described tracts of land situated in the State of Texas which belonged to Edward Hanrick, late of Montgomery, Montgomery county, State of Alabama, dec'd, A. D. 1865, or which he had or claimed to have a right, title, and interest, and known and described as folows, to wit:

1st. First. A tract of forty-four thousand two hundred and eighty (44,280) acres in Williamson county, originally granted to Rafael Aguire.

2d. Second. A tract of forty-four hundred and twenty-eight (4,428) acres in Falls county, which two tracts of land were granted to Rafael Aguirie.

3d. Third. A tract of twenty-one thousand four hundred and seventy-six (21,476) acres in Falls county; which tract of land was granted to one Pedro Zarza.

4th. Fourth. A tract of forty-eight thousand seven hundred and eight (48,708) acres in Falls county, which tract of land was granted to one Antonio de la Serda.

5th. Fifth. A tract of forty-eight thousand seven hundred and eight acres in Milam county, which said tract of land was granted to one Miguel Davilla.

221 6th. Sixth. A tract of forty-four hundred and twenty-eight (4,428) — in Liberty county, which tract of land was granted to one J. F. De Rumazor.

7th. Seventh. A tract of twenty-two hundred and fourteen (2,214) acres in Liberty county, which tract of land was granted to one Andrew Weaver.

And also any interest which we or any of us have or may have in or to any other land in the said State of Texas by reason or virtue of our being heirs of the said Edward Hanrick, dec'd: To have and to hold the granted premises, with all the privaledges and appurtenances thereto belonging, to the said William Jenkins, Jr., & his heirs and assigns, to their own — and behoof, forever.

We do hereby, for ourselves, and our heirs, executors, and administrators, covenant with the said grantee, and his heirs and assigns, that we are lawfully seized of an interest in fee-simple of the granted premises aforesaid; that they are free from all incumbrances by us incurred; that we have good right to sell and convey the same as aforesaid, and that we will, and our heirs, executors, and administrators shall, warrant and defend the same to the said grantee
222 & his heirs and assigns forever against the lawful claims and demands of all persons.

In witness whereof we, the said James Hanrick, John Hanrick, & Elizabeth O'Brien, hereunto set our hands and seals, this 1st day of February, in the year one thousand eight hundred and seventy-eight.

JAMES HANRICK, [SEAL.]
JOHN HANRICK, [SEAL.]
ELIZABETH O'BRIEN,
By PHILIP O'BRIEN,
Their Attorney-in-Fact.

Signed and sealed in presence of—
EDWARD J. JONES.
FANNIE J. SARGFNT.

COMMONWEALTH OF MASSACHUSETTS, } ss:
County of Suffolk, City of Boston, }

Be it remembered that I, Edward J. Jones, a commissioner for the State of Texas, residing in the city of Boston, in the county of Suffolk, and Commonwealth of Massachusetts, duly appointed, commissioned, and authorized by his excelleney the Governor of the State of Texas to take the acknowledgment and proof of the execution of deeds and other instruments in writing, under seal or not, to be used or recorded in said State of Texas, and to take depositions, to administer oaths & affirmations, &c., do hereby certify that on the second day of February, in the year one thousand eight hundred and seventy-eight, in the city of Boston,
223 in the county of Suffolk aforesaid, personally appeared before me Philip O'Brien, of said Boston, as attorney-in-fact for James Hanrick, John Hanrick, & Elizabeth O'Brien, named as grantors in the annexed deed, known to me to be the individual described in, and who did then and there in my presence execute the annexed deed as said attorney-in-fact of said grantors, and after a full explanation of the contents, force, nature, & effect of said deed by me, he acknowledged to me that he had, understandingly, freely, and voluntarily, executed the said deed for all the uses & purposes therein expressed; and the said Philip O'Brien further acknowledged and declared to me that he, as said attorney-in-fact of said grantors, does not wish to retract his execution of said deed, & desired that it might be received by the grantee, and of right to be recorded, — to the laws of the State of Texas.

In witness whereof, I have hereunto set my hand and official seal, at said city of Boston, in the county & Commonwealth aforesaid, this second day of February, in the year of our Lord one thousand eight hundred & seventy-eight.

EDWARD J. JONES,
A Commissioner for the State of Texas.

Filed May 26th, 1882, at 10 a. m., and recorded same day.
J. W. WATKINS,
C. C. C. F. Co.
By C. H. BARTLETT, *D. C.*

224 THE STATE OF TEXAS, *County of Falls:*

I, J. W. Watkins, clerk of the county court in and for said county & State, do hereby certify that the foregoing is a true and correct copy of a deed from James Hanrick *et al.* to William Jenkins, Jr., as the same appears of record in my office, in book R, pages 110, 111, & 112, Falls county record of deeds.

Given under my hand and seal of office, this October 2d, 1882.

[SEAL.] J. W. WATKINS,
C. C. C. F. Co.
By C. H. BARTLETT, *D. C.*

It was admitted that the interest conveyed by above deed was on same day conveyed to Eliza M. O'Brien, wife of Philip O'Brien.

8. Deed by Philip O'Brien and Eliza M. O'Brien to John B. Sargent, dated Feb. 1st, 1878, as follows, viz:

Know all men by these presents that I, Eliza Mercy O'Brien, in her own right, wife of Philip O'Brien, of Boston, in the county of Suffolk & Commonwealth of Massachusetts, late of Albany, New York, the said Philip joining in this conveyance, in consideration of one dollar & other valuable considerations paid by John B. Sargent, of said Boston, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell, & convey unto the said John B. Sargent, in his own right, his heirs and assigns, one undivided half of all my right, title, & interest in & to the following-described
225 land situated in the State of Texas (the said land being the same this day *being* conveyed to me by William Jenkins, Jr., to wit:)

First. A tract of forty-four thousand two hundred & eighty (44,280) acres in Williamson county.

Second. A tract of forty-four hundred and twenty-eight (4,428) [acres] in Falls county, which two tracts of land were granted to one Raphel Aguire.

Third. A tract of twenty-one thousand four hundred & seventy-six (21,476) acres in Falls county, which tract of land was granted to one Pedro Zarza.

Fourth. A tract of forty-eight thousand seven hundred & eight (48,708) acres in Falls county, which tract of land was granted to one Antonio De La Serda.

Fifth. A tract forty-eight [thousand] seven hundred and eight (48,708) acres in Bell county, which tract of land was granted to one Miguel Davilla.

Sixth. A tract of four thousand four hundred & twenty-eight acres in Liberty county, which tract of land was granted to one J. F. De Rumazor.

Seventh. A tract of twenty-two hundred & fourteen (2,214) acres in Liberty county, which tract of land was granted to one Andrew Weaver.

And also one undivided half of my interest I have or may have to any other land in the said State of Texas by virtue of the
226 aforesaid-mentioned deed to me from William Jenkins of even date herewith, to have & to hold the granted premises, with

all the privileges and appurtenances thereto belonging, to the said John B. Sargent & his heirs and assigns to their own use and benefit, forever. And I do hereby, for myself and my heirs, executors, & administrators, covenant with the said grantee & his heirs and assigns that I am lawfully seized of an interest in fee-simple of the granted premises as aforesaid; that they are free from all encumbrances by me incurred, & I have good right to sell & convey the same as aforesaid, and that I will, and my heirs, executors, & administrators shall, warrant & defend the same to the said grantee & his heirs and assigns, forever, against the lawful claims & demands of all persons.

In witness whereof, we, the said Eliza Mercy O'Brien & Philip O'Brien, hereunto set our hands and seals, this, the first day of February, in the year one thousand eight hundred & seventy-eight.

ELIZA MERCY O'BRIEN.
PHILIP O'BRIEN.

Signed and sealed in presence of—

The words "John B." written over and erasure in three
227 places, & Eliza Mercy O'Brien in one place before signing, and also the words "John B. Sargent" & "his" for "her" in three places.

EDWARD J. JONES.
FANNIE J. SARGENT.

COMMONWEALTH OF MASSACHUSETTS, } *ss:*
County of Suffolk, City of Boston, }

Be it remembered that I, Edward J. Jones, a commissioner for the State of Texas, residing in the city of Boston, in the county Suffolk and Commonwealth of Massachusetts, duly appointed and commissioned and authorized by his excellency the Governor of the State of Texas, and under the laws of the State of Texas, to take the acknowledgment and proof of execution of deeds and other instruments in writing under seal, or not to be used or recorded in the State of Texas, and to take depositions, to administer oaths and affirmations, &c., do hereby certify that on the 2d day of February, in the year one thousand eight hundred & seventy-eight, in the city of Boston, in the county of Suffolk aforesaid, personally appeared before me Eliza Mercy O'Brien, wife of Philip O'Brien, both of said Boston, and known to me to be the individuals described in and who did then & there in my presence execute the annexed
228 deed, and after a full explanation of the contents, force, nature, and effect of said deed by me, they *she* acknowledged severally to me that they *she*, understandingly, freely and voluntarily executed the said deed for the consideration and for all the uses and purposes therein expressed, & the said Eliza Mercy O'Brien in her own right and said *said* Philip O'Brien further acknowledged and declared to me that they *she* did not wish to retract their execution of said deed, & desired that it might be received by the grantee, and of right to be recorded according to the laws of the State of Texas.

In witness whereof I have hereunto set my hand and official seal, at the city of Boston, in the county and Commonwealth aforesaid, this 2d day of Febr'y, in the year of our Lord one thousand eight hundred and seventy-eight.

EDWARD J. JONES,
A Commissioner for the State of Texas.

Filed Aug. 15, 1882, at 4 p. m., and recorded Aug. 18, 1882.
J. W. WATKINS,
C. C. C. F. Co.
By C. H. BARTLETT, *D. C.*

THE STATE OF TEXAS, *County of Falls:*

I, J. W. Watkins, clerk of the county court, Falls county,
229 do hereby certify that the foregoing is a true and correct copy of a deed from Philip and Eliza M. O'Brien to John B. Sargent, as the same appears of record in my office in book R, page 225, 6, & 7, Falls county record of deeds.

Given under my hand and seal of office, this April 5th, 1883.
[SEAL.] J. W. WATKINS, *Clerk.*
By C. H. BARTLETT, *D. C.*

9. Deed by Philip O'Brien in his own right and as agent of his wife and as att'y-in-fact for James Hanrick, John Hanrick, and Elizabeth O'Brien to John B. Sargent, dated Feb. 14th, 1878, as follows, viz:

THE STATE OF TEXAS, *County of* ——

Know all men by these presents that I, Philip O'Brien of the city of Boston, county of Suffolk, Massachusetts, acting for myself and for my wife, Eliza M. O'Brien, and for James Hanrick, John Hanrick and Elizabeth O'Brien, heirs of Edward Hanrick, dec'd, parties of the first part, in consideration of one thousand dollars to be paid
230 to us by John B. Sargent of the same place, besides other good considerations to be rendered, have granted, bargained, & sold, and do hereby grant, bargain, sell, alien, convey, & confirm unto the said John B. Sargent, party of the second part, his heirs and assigns forever, one undivided one-half interest of, in, and to all the property of the estate of Edward Hanrick, deceased, situated in the State of Texas, to which we are in any way entitled; our interest therein being three-fourths thereof, & for more perfect description reference is had to the inventory of said estate, and the records pertaining thereto, Edward G. Hanrick being the administrator and entitled to one-fourth thereof, and the description of the same in part is as follows, to wit: Ten leagues in Williamson county, granted to Rafael Aguirie; one league in Falls county, same grant; 21,476 acres, supposed to be in Falls county and in Williamson county, granted to Pedro Zarza; eleven leagues in Falls county, granted to Antonio de La Serda; eleven leagues in Milam county, granted to Miguel Davilla; one league in Liberty county, granted to J. F. De Rumazor; and one-half league in Liberty county, granted to An-

231 drew Weaver: to have and to hold all and singular the above described and conveyed premises and property, with all the rights, privileges, hereditaments, and appurtenances thereunto belonging to or in anywise appertaining, unto the said John B. Sargent, party of the second part, his heirs or assigns, forever; and we, the said parties of the first part, do hereby bind ourselves, our heirs, executors, and administrators unto the said party of the second part, his heirs and assigns; that we are now well seized of all and singular the said property and premises, and that we have good right and lawful authority to make this sale and conveyance of the same; that said our interest- in the property and premises are free and clear of all and every encumbrance, and that unto the said party of the second part, his heirs and assigns, that we and our heirs, executors, and administrators will forever warrant and defend the same against all adverse lawful claim or claims whatsoever.

In testimony whereof we do hereunto affix our hands and
232 seals, using scrolls for seals, this 14th day of Feby, A. D. one thousand eight hundred and seventy-eight.

PHILIP O'BRIEN,
ELIZA MERCY O'BRIEN,
JAMES HANRICK,
JOHN HANRICK,
ELIZABETH O'BRIEN,
By PHILIP O'BRIEN,
Their Attorney-in-fact.

Witnesses at the request of grantor.
WHARTON BRANCH.
FRED. BARNARD.
W. G. HATCH.

STATE OF TEXAS, *Galveston County:*

Before me, the undersigned authority, personally appeared Philip O'Brien, to me known, who acknowledged that for himself and as attorney-in-fact for his wife, Eliza Mercy O'Brien, James Hanrick, John Hanrick, and Elizabeth O'Brien, he had signed, sealed, executed, and delivered the foregoing and attached deed as the act & deed of himself and his principal for all the purposes and considerations therein expressed.

Given under my hand and notarial seal, this 14th day of Feb'y, 1878.

J. STEWART CLEVELAND,
Notary Public for Galveston Co., State of Texas.

Filed April 16, 1881, at 8 a. m., and recorded same day.

J. W. WATKINS,
C. C. C. F. Co.
233 Per C. H. BARTLETT, *D. C.*

THE STATE OF TEXAS, *County of Falls:*

I, J. W. Watkins, clerk of the county court, Falls county, hereby

certify that the foregoing is a true & correct copy of a deed from Philip O'Brien *et al.* to Jno. B. Sargent, as the same appears of record in my office in book R, pages 100, 1, & 2, Falls county record of deeds.

Given under my hand and seal of office, this Octo. 2d, 1882.

J. W. WATKINS,
C. C. C. F. Co.
By C. H. BARTLETT.

10. Deed by same grantors as in last above-mentioned to Wharton Branch, dated Feb'y, 1878, as follows, viz:

THE STATE OF TEXAS, *County of Galveston:*

Know all men by these presents that I, Philip O'Brien, of Boston, Massachusetts, acting for myself and for my wife, Eliza M. O'Brien, and for James Hanrick and John Hanrick, & Elizabeth O'Brien, heirs of Edward Hanrick, deceased, parties of the first part, in con-
234 sideration of one dollar to us paid by Wharton Branch, of the city and county of Galveston, Texas, besides other good and valuable considerations, have granted, bargained, & sold, and do hereby grant, bargain, sell, alien, convey, and confirm unto the said Wharton Branch, party of the second part, his heirs and assigns, forever, one undivided one-quarter interest of, in, and to all of the property of the estate of Edward Hanrick, dec'd, situated in the State of Texas, and for more perfect description reference is had to the inventory of said estate and the records pertaining thereto, Edward G. Hanrick being the administrator of said estate and entitled to one fourth thereof, and the description of the same is in part as follows, to wit: Ten leagues in Williamson county and one league in Falls county, granted to Rafael Aguere; 24,476 acres, supposed to be in Falls and Williamson counties, granted to Pedro Zarza; eleven leagues in Falls county, granted to Antonacio de la Serda;
235 eleven leagues in Milam county, granted to Miguel Davilla; one league in Liberty county, granted to J. F. De Rumazor; and ½ league in Liberty county, granted to Andrew Weaver: To have and to hold all and singular the above described and conveyed premises and property, with all the rights, privileges, hereditaments, and appurtenances thereunto belonging or in any wise appertaining unto the said Wharton Branch, party of the second part, his heirs or assigns, forever; and we, the said parties of the first part, do hereby bind ourselves, our heirs, executors, and administrators unto the said party of the second part, his heirs and assigns, that we are well seized of all and singular the said property and premises; that we have good right & lawful authority to make this sale & conveyance of the same; that our interest in said property and premises are free and clear of all and every incumbrance; and that unto the said party of the second part, his heirs and assigns, that we and our heirs, executors, & administrators will forever
236 warrant & defend the same against all adverse lawful claim or claims whatsoever. The words "our interest in" interlined before signing.

In testimony whereof, we do hereunto affix our hands seals, using

scrolls for seals, this 14th day of February, A. D. one thousand eight hundred and seventy-eight.

PHILIP O'BRIEN,
ELIZA MERCY O'BRIEN,
JAMES HANRICK,
JOHN HANRICK,
ELIZABETH O'BRIEN,
By PHILIP O'BRIEN,
Their Attorney-in-Fact.

Witnesses at request of grantor.
JOHN B. SARGENT.
V. G. HATCH.
F. BARNARD.

THE STATE OF TEXAS, *Galveston County:*

Before me, the undersigned authority, personally appeared Philip O'Brien, to me known, who acknowledged that for himself & as attorney-in-fact for his wife, Eliza M. O'Brien, James Hanrick, John Hanrick, and Elizabeth O'Brien, he signed, sealed, executed, and
237 delivered the foregoing and attached deed as the act and deed of himself and his principals for all the purposes & considerations therein expressed.

Given under my hand and notarial seal, this 14th day of February, 1878.

J. STEWART CLEVELAND,
Notary Public for Galveston County, State of Texas.

Filed Apr. 16th, '81, at 8 am., & recorded same day.

J. W. WATKINS,
C. C. C., F. Co.,
By C. H. BARTLETT, *Deputy.*

THE STATE OF TEXAS, *County of Falls:*

I, J. W. Watkins, clerk of the county court, of Falls county, Texas, hereby certify that the foregoing is a true and correct copy of a deed from Philip O'Brien *et al.* to Wharton Branch, with its certificate of authentication, as the same appears of record in my office, in book Q, pages 102, 3, 4, Falls county record of deeds.

Given under my hand and seal of office, this April 24th, 1882.

J. W. WATKINS,
C. C. C., F. Co.,
By C. H. BARTLETT, *D. C.*

11. Deed by John B. Sargent to Wharton Branch, dated Feb. 14, 1878, conveying in consideration of one dollar, besides other
238 good and valuable considerations an undivided one-half of grantor's interest in estate of Edward Hanrick, deceased, and referring for description to deed to him above set out.

12. Deed by Nicholas Hanrick & wife to Eliza M. O'Brien, wife of Philip O'Brien, dated Aug. 21, 1877, as follows, viz.: This indenture made the twenty-first day of August, in the year one thou-

sand eight hundred and seventy-seven, between Nicholas Hanrick of the city, county, and State of New York, butcher, son of James Hanrick of Tournmanign, Ireland, brother of Edward Hanrick, and Kate Hanrick, his wife, of the same place, parties of the first part, to Eliza Nancy O'Brien of the city of New York, State of New York, party of the second part, witnesseth: That the said parties of the first part for and in consideration of the sum of one dollar, lawful money of the United States, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowl-
239 edged, & the said party of the second part, her heirs, executors, & administrators forever release and discharge from the same by these presents, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, and to her heirs and assigns, forever, all the right, title, and interest of the party of the first part of, in, and to each and all of the following tracts of land which belonged to Edward Hanrick of Montgomery county, State of Alabama, United States of America, deceased, 1865, A. D., or in which he has or claimed to have a right, title, or interest, all situated lying & being in the State of Texas, in the United States of America, namely:

First a tract of forty-four thousand two hundred and eighty (44,280) acres in Williamson county.

Second. A tract of forty-four hundred & twenty-eight (4,428) acres, in Falls county, which two tracts of land were granted to one Rafael Aguire.

Third. A tract of twenty one thousand and four hundred
240 & seventy-six (21,476) acres, in Falls county, which tract of land was granted to one Pedro Zarza.

Fourth. A tract of forty-eight thousand seven hundred and eight (48,708) acres in Falls county, which tract of land was granted to one Miguel Davilla.

Fifth. A tract of forty-eight thousand seven hundred and eight (48,708) acres in Bell county, which tract of land was granted to one Miguel Davilla.

Sixth. A tract of forty-four hundred and twenty-eight (4,428) acres in Liberty county, which tract of land was granted to one J. T. De Rumazor.

Seventh. [A tract] of twenty-two hundred and fourteen (2,214) acres in Liberty county, which tract of land was granted to one Andrew Weaver.

And, also, any and all other lands in the said State of Texas which belonged to the said Edward Hanrick at the time of his decease, or in which he had any right, or title, or interest, the same having descended to and the title thereof become vested in the said party of the first part upon the decease of the said Edward Hanrick,
241 the party of the first part being his sister and one of his heirs-at-law; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise ap-

pertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, and property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: To have and to hold the above-granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, to her and their own proper use, benefit, and behalf, forever. And the said Nicholas Hanrick and Kate Hanrick, his wife, for their executors and administrators, do covenant, grant, and agree to and with the said party of the second part, her heirs, and assigns, that the said Nicholas Hanrick and Kate, his wife, at the time of the sealing and delivery of these presents,
are lawfully seized in of a good, absolute, and indefeasa-
242 ble estate of inheritance in fee-simple of and in all and
singular the above-granted and described premises, with the appurtenances, and has good right, full power, & lawful authority to grant, bargain, sell, & convey the same in manner aforesaid; & that the said party of the second part, her heirs, and assigns shall & may at all times hereafter peaceably & quietly have, hold, use, occupy, and enjoy the above-granted premises & every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said parties of the first part, their heirs or assigns, or of any other person or persons lawfully claiming or to claim the same; and that the same now are free, clear, and discharged, and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, & encumbrances, of what nature or kind whatsoever, and also that the said parties of the first part and their heirs and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title, or interest of, in, or to the here-
243 inafter-granted premises by law, from, under, or in trust for
them shall and will, at any time or times hereafter, upon the reasonable request and at the proper costs & charges in the law of the said party of the second part, her heirs, and assigns, make, do, and execute, or cause to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law for the better or more effectually vesting and confirming the premises hereby granted or so intended to be in and to the said party of the second part, her heirs, and assigns, forever, as by the said party of the second part, her heirs or assigns, or their counsel learned in the law shall be reasonably advised or required. And the said Nicholas Hanrick and Kate, his wife, for their heirs, the above-described and hereby-granted and released premises and every part and parcel thereof, with the appurtenances, unto the said party of the second part, her heirs, and assigns, against the said parties of the first part & their heirs, & against all and every person or persons whomsoever lawfully claiming or to claim the same shall
and will warrant and by these presents forever defend.
244 In witness whereof, the said parties of the first part have

hereunto set their hands and seals, the day and year first above written.

NICHOLAS HANRICK.
KATE HANRICK.

Sealed and delivered in the presence of—
ALEX. T. BLUM,
ALEX. O. STUART.

STATE OF NEW YORK, *City of New York:*

On the twenty-first day of August, in the year one thousand eight hundred and seventy-seven, before me, Alex. Ostrander, a commissioner for Texas in New York, personally came Nicholas Hanrick and Kate Hanrick, his wife, to me known to be the same persons described in and who executed the within instrument, bearing date the 21st day of August, 1877, and severally acknowledged that they signed, sealed, and delivered the same as their voluntary act and deed for the consideration, uses, and purposes therein expressed; and at the same time and place the said Kate, wife as aforesaid, having been examined by me privily and apart from her
245 said husband, and having the said instrument fully explained to her, the *the* said Kate Hanrick acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same without any fear or compulsion of her said husband, & that she did not wish to retract the same.

In testimony whereof, I have hereunto set my hand & affixed my official seal, at said city of New York, this 21st day of Aug., A. D. 1877.

ALEX. OSTRANDER,
Commissioner for Texas in New York,
No. 33 Park Row, N. Y. city.

Filed April 16, '81, at 8 a. m., & recorded same day.

J. W. WATKINS,
C. C. C. F. Co.
By C. H. BARTLETT,
Dep'ty.

THE STATE OF TEXAS, *County of Falls:*

I, J. W. Watkins, clerk of the county court, Falls county, hereby certify that the foregoing is a true and correct copy of a release from Nicholas Hanrick *et al* to Eliza N. O'Brien, with its certificate of authentication, as the same appears of record in my office, in book Q, pages 96, 97, 98, 99, & 100, Falls county record of deeds.

246 Given under my hand and seal of office, this April 24th, 1882.

[SEAL.]

J. W. WATKINS,
C. C. C. F. Co.
By C. H. BARTLETT,
Dep'y.

13. Deed by Ellen Hanrick to Eliza M. O'Brien, dated April 3, 1878, for like consideration as mentioned in deed last above, conveying all her interest in same property. Similar covenants of warranty.

14. Deed by Honora Hanrick to Eliza M. O'Brien, dated April 3d, 1878. Same in form, substance, and recitals as deed last mentioned.

15. Deed by Edward Hanrick to Falls county, dated Sept. 1, 1854, as follows, viz:

Know all men by these presents that I, Edward Hanrick, of the town of Montgomery, in the State of Alabama, for divers good reasons and valuable considerations, rec'd from the county of Falls, in the State of Texas, the receipt of which is hereby — me hereunto naming have given, remised, released, and forever quit-claimed, and by the presents do give, remise, release, and forever quit-claim, unto the said county of Falls and its successors the following-
247 described piece or parcel of land, with all my right, title, and interest thereto, situated in the said county of Falls and bounded as follows, that is to say: Commencing at a stake at the southeast corner of the conveyed premises, which may be found thus, viz: starting at the southwest corner of W. N. P. Marlin fourth of a league and run north two degrees west (N. 10 W.) twenty-nine hundred and seventy (2,970) varas to a prairie, continue the same course seven hundred and thirty (730) varas further to the entrance of a post-oak grove; thence run north twenty-five degrees west (N. 25 W.) two hundred and seventy-three and a half (273½) varas to a stake, from which a mesquite seven inches in diameter bears north 55° E. one hundred and four (104) varas distant and another mesquite six inches in diameter bears south 22° E. four hundred (400) varas distant; this stake marks the southeast corner of a tract of land hereby conveyed and is the beginning corner of the survey thereof; thence from said stake run due north nineteen hundred varas (1,900) to a stake in prairie; thence due
248 west nineteen hundred (1,900) varas to a stake in post-oak timber; thence due south nineteen hundred (1,900) varas to a stake in prairie; thence due east nineteen hundred (1,900) varas to the said point of beginning, containing within said boundary six hundred and forty acres of land, more or less, hereby conveyed for the county seat of said Falls county, and to have and to hold the said above described tract of land unto the said county of Falls and its successors as and for the county seat of the said county, so long as it shall remain or continue to be (as it now is) the county seat of said county, its successors by whatsoever name the same may be known or called in or by reason of any Legislature act or acts hereafter to be passed or adopt-: Provided, however, that upon the *non user* or relinquishment of the said conveyed premises by the said county of Falls, or any of its successors as such "county seat," and the establishment of its county seat elsewhere, in lieu of the premises herein conveyed, then, and in such case (should it ever happen), the said tract of land hereby granted shall thereupon

record, Feb'y 12, A. D. 1855, at 6 o'clock p. m., and was duly recorded April 3d, A. D. 1855.

S. D. BARCLAY,
254 *Co. Cl'k F. C.*

THE STATE OF TEXAS, *County of Falls:*

I, J. W. Watkins, cl'k of the county court, Falls county, do hereby certify that the foregoing is a true and correct copy of a deed from Edw'd Hanrick to B. G. Shields, as the same appears of record in my office in book B, pages 320 & 321, Falls Co. record of deeds.

Given under my hand and seal of office, this April 3d, 1883.

J. W. WATKINS, *Clerk,*
By C. H. BARTLETT, *D. C.*

The def't then introduced the record of a suit in the U. S. circuit court at Austin, styled Edward G. Hanricks, administrator of Edward Hanrick, deceased, *vs.* David Barton *et al.*, by which he proved that in the lifetime of Edward Hanrick, viz., Dec. 1, 1860, he caused a suit to be brought in said court against David Barton and others in possession and against T. J. Chambers to recover a certain tract of land fully described in his plea, alleged to contain eleven leagues of land and formerly granted to Antonacia De La Serda; that
255 said cause was continued generally until Jan., 1867, when the death of pl't'ff was suggested, and suit was revived in the name of Edward G. Hanrick as sole heir and administrator, and in June, 1868, the said T. J. Chambers having died, his administratrix, Abby Chambers, appeared as landlord of the other parties and made defence general—denial not guilty—title by virtue of two grants of five leagues each to T. J. Chambers, one dated 1832 and one 1834, and limitation; that the said parties being at issue, a trial was had in said court and resulted in a judgment for the def'ts on the 13th day of July, 1870, which said judgment, on error to the Supreme Court of the United States, being prosecuted by the pl't'ff, E. G. Hanrick, was by said Court reversed, and cause remanded Dec. 1, 1872; and afterward, viz, at the Jan. term, 1874, of the said circuit court, the parties to said cause being again at issue on the question of title and possession, a trial by jury was had, who, after hearing the evidence and charge of the court, returned a general verdict for the def'ts, and judgment was entered thereon; that the plaintiff,
256 E. G. Hanrick, again prosecuted a writ of error to the Supreme Court of the United States, where it remained pending until the 12th day of October, 1877, when the said writ was dismissed under the 16th rule of said Court, the pl't'ff in said writ failing to appear.

The def't, E. G. Hanrick, then produced evidence to the jury proving that he and his tenants and agents have had and held actual possession of the tracts of land sued for since 1867; that he has improved it, cultivated it, paid taxes on it, and, jointly with his cotenant, E. J. Gurley, has held the same adversely to all others; said improvements were not all within same enclosure, but were in different places—scattered about over each tract of land, the greater part not being enclosed.

It was proven to the jury that the def't, E. G. Hanrick, was, by the probate court of Falls county in 1867, appointed administrator of the estate of Edward Hanrick, deceased; that he returned an inventory of said estate; that the last order made by said court
257 in said estate was made in 1869; that the papers were burned with the court-house; that said administration was never formally closed.

Evidence was then produced before the jury tending to sustain the allegations in pl't'ffs' first supplemental petition, filed April 5, 1883, and evidence was also produced to the jury tending to rebut the facts alleged in said plea.

The above and foregoing being the substance of all of the testimony admitted to the jury, the def't, E. G. Hanrick, by his counsel, before the jury retired, prayed the court to direct the jury to return a general verdict for the defendants, but the court refused to so instruct the jury; to which ruling of the court the said def't, Hanrick, by his counsel, then and there excepted, and prayed a bill of exceptions, which is granted and made part of the record; but the court charged the jury substantially as follows, viz: Withdrawing from their consideration the claim of title set up by the defendant, E. G. Hanrick, under his deed from George
258 E. Lane as set out in this bill; also withdrawing from their consideration the deeds made by the deceased Edward Hanrick in his lifetime; also withdrawing from the consideration of the jury the evidence produced by the def't, Hanrick, in support of his pleas of limitation, and upon the defence set up by the def't of want of title in the pl't'ffs when suit was brought the court charged the jury substantially as follows, viz: The def't offers and urges, to defeat the pl't'ff's and the intervenors' offer, and press on their own behalf, two deeds made by Philip O'Brien for himself and purporting to be attorney-in-fact for his mother, Elizabeth O'Brien, and his uncles, John and James Hanrick. It is not controverted that at the time of the execution of these deeds to the intervenors both John and James Hanrick were dead and had died subsequent to the death of Edward Hanrick. The death of John and James Hanrick revoked their power of attorney, and the instrument continued to have force only as the power of attorney of Elizabeth O'Brien, still
259 living, and the said deeds to intervenors—unless void for fraud, on which issue I will instruct you further on in this charge—had the effect to convey to the intervenors $\frac{3}{4}$ of the interest which Elizabeth had in Edward Hanrick's estate at the time said power of attorney was executed, namely, $\frac{3}{4}$ of $\frac{1}{4} = \frac{3}{16}$ of the whole estate, leaving in said Elizabeth $\frac{1}{16}$ interest inherited direct from said Edward, and $\frac{1}{12}$ interest subsequently to Edward's death, through her brother John, making an interest of $\frac{7}{48}$ interest in the estate remaining in the said Elizabeth, notwithstanding the deeds to intervenors giving to said deeds full effect as conveyances made and delivered in good faith, and to that extent, namely, to the extent of an interest of a $\frac{7}{48}$ portion of said land, (if the plaintiffs' grantor was the said Elizabeth, that is, if Eliza O'Brien, who conveyed to Eliza Mercy O'Brien, is the said Elizabeth,) the pl't'ffs' right is not defeated or

qualified by anything advanced by either the defendant or the intervenors, and to that extent, if no further, you will find for
260 the pl't'ffs' (if you have found that said Eliza O'Brien and the said Elizabeth are the same person).

To which ruling of the court in withdrawing the said issues from the jury, as well as the said ruling of the court upon the construction of the said deeds to the intervenors and in directing the jury that pl't'ffs' were entitled to recover a $\frac{7}{48}$ interest notwithstanding said deeds to intervenors, the defendant, Hanrick, by his counsel, then and there, before the jury retired from the bar, excepted and prayed a bill of exceptions, which is granted, signed, and made part of the record.

April 16th, 1883.

A. P. McCORMICK,
Dist. Judge.

The bond of pl'ff in error is endorsed, to wit:

No. 14. E. G. Hanrick, pl'ff in error, *vs.* Eliza M. O'Brien, Philip O'Brien, and Wm. Brady, def'ts in error. Bond of pl'ff in error. Approved April 16th, 1883. Filed April 16th, 1883. J. H. Finks, clerk.

261 *Bond.*

The bond of pl't'ff in error is in words, to wit:

Know all men by these presents that we, Edward G. Hanrick and E. J. Gurley and L. W. Goodrich, are held and firmly bound unto Philip O'Brien, Eliza M. O'Brien, and William Brady in the full and just sum of two thousand dollars, to be paid to the said Philip O'Brien, Eliza M. O'Brien, and William Brady, their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of April, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately, at a term of United States circuit court for the 5th circuit & northern district of Texas, at Waco, in said district, in a suit depending in said court between Philip O'Brien, Eliza M. O'Brien, and William Brady, plaintiffs, and the said Edward G. Han-
262 rick, def't, and John B. Sargent and Wharton Branch, intervenors, judgment was rendered against the said Edward G. Hanrick, def't, and the said intervenors, John B. Sargent and Wharton Branch; and the said Edward G. Hanrick, defendant therein, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Philip O'Brien, Eliza M. O'Brien, and William Brady, or their att'ys, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such, that if the said

Edward G. Hanrick shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else, to remain in full force and virtue.

E. G. HANRICK. [SEAL.]
E. J. GURLEY. [SEAL.]
L. W. GOODRICH. [SEAL.]

Sealed and delivered in the presence of—
L. C. ALEXANDER.
WM. M. FLOURNOY.

Approved by—
A. P. McCORMICK, *Dist. Judge.*

April 16th, 1883.

263 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Texas, in the 5th circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at Waco, between Eliza M. O'Brien, Philip O'Brien, and William Brady, plaintiffs, and E. G. Hanrick, defendant, and John B. Sargent and Wharton Branch, intervenors in said cause (No. 14 on the docket of said court, sitting at Waco), a manifest error hath happened, to the great damage of the said E. G. Hanrick, defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court [of] the United States, this 16 day of April, in the year of our Lord one thousand eight hundred and eighty-three.

[The Seal of the U. S. Circuit Court, Northern Dist., Texas, Waco.]

J. H. FINKS,
Clerk of the Circuit Court of the United States, at Waco.
With the Seal of said Circuit Court.

Allowed by—
A. P. McCORMICK,
Dist. Judge.

April 16th, 1883.

264 [Endorsed:] No. 14. E. G. Hanrick, p't'ff in error, *vs.* Eliza M. O'Brien, Philip O'Brien, and Wm. Brady, def'ts in error. Writ of error allowed April 16, 1883. Filed April 16, 1883. J. H. Finks, clerk.

265 The United States of America to Eliza M. O'Brien, Philip O'Brien, and William Brady, or their attorneys of record, Messrs. Brady & Ring, and J. M. Anderson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the 5th circuit & northern district of Texas, at Waco, wherein E. G. Hanrick is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 16th day of April, in the year of our Lord one thousand eight hundred and eighty-three.

A. P. McCORMICK,
Dist. Judge.

April 16th, 1883.

Attest, with the seal of the United States circuit court at Waco and the signature of the clerk thereof, this April 16, 1883.

[The Seal of the U. S. Circuit Court, Northern Dist., Texas, Waco.]

J. H. FINKS, *Clerk.*

266 On this 13th day of June, in the year of our Lord one thousand eight hundred and eighty-three, personally appeared Rufus G. Griesenbeck, dep'y U. S. marshal, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to H. F. Ring, Esq., attorney of record for the within-named plaintiffs, on this 13th day of June, A. D. 1883.

RUFUS J. GRIESENBECK,
Dep. U. S. Marshal.

Sworn to and subscribed before me this 13th day of June, A. D. 1883.

Test, with seal of the U. S. cir. court, at Waco.

[The Seal of the U. S. Circuit Court, Northern Dist., Texas, Waco.]

J. H. FINKS, *Clerk.*

(Endorsed:) No. 14. E. G. Hanrick, p't'ff in error, *vs.* Eliza M. O'Brien, Philip O'Brien, and Wm. Brady, def'ts in error. Citation in error. Issued April 16, 1883, & lodged in this court same day. J. H. Finks, clerk. Filed April 16, 1883. J. H. Finks, clerk.

267 I, J. H. Finks, clerk of the circuit court of the United States, 5th circuit, in and for the northern district of Texas, at Waco, certify that the foregoing two hundred and sixty-six pages in writ-

ing contain a full and true transcript of the record and all the proceedings had as they appear of file and record in this court in cause No. 14, entitled Eliza M. O'Brien *et al. versus* E. G. Hanrick.

In testimony whereof I have hereunto set my hand and the impress of the seal of said court, at Waco, the 16th day of July, A. D. 1883.

[The Seal of the U. S. Circuit Court, Northern Dist., Texas, Waco.]

J. H. FINKS, *Clerk.*

Endorsed on cover: N. Texas, C. C. U. S. No. 256. E. G. Hanrick, plaintiff in error, *vs.* Eliza M. O'Brien, Philip O'Brien, and William Brady. Filed August 16th, 1883.

MOTION TO DISMISS WRIT OF ERROR

FOR WANT OF JURISDICTION.

Office Supreme Court U. S.
FILED.
SEP 14 1885
JAMES H. McKENNEY.
CLERK.

119—156

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1885.

No. 256.

E. G. HANRICK, PLAINTIFF IN ERROR,

vs.

ELIZA M. O'BRIEN, PHILIP O'BRIEN AND WILLIAM BRADY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

NOTICE.

The Plaintiff in Error in the above numbered and entitled cause, or his counsel of record L. W. Goodrich, Esq., and B. B. Clarkson, Esq., comprising the law firm of Goodrich & Clarkson, will please take notice:

That the Defendants in Error have filed in the Supreme Court of the United States, at Washington, a motion to dismiss said writ of error, together with a brief and argument in support of the same, and that this is a true copy of said motion, brief and argument, and also that on the second Monday in October, 1885, or so soon thereafter as counsel can be heard, the action of said Court on said motion will be invoked by the Defendants in Error.

J. T. BRADY,
Of Counsel for the Defendants in Error.

Motion to Dismiss Writ of Error

FOR WANT OF JURISDICTION.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1888.

No. 256.

E. G. HANRICK, PLAINTIFF IN ERROR,

vs.

ELIZA M. O'BRIEN, PHILIP O'BRIEN AND WILLIAM BRADY.

To the Honorable, the Supreme Court of the United States:

The Defendants in Error respectfully represent:

That the judgment of the Court below, from which this writ of error is prosecuted, was a joint judgment rendered against the Plaintiff in Error E. G. Hanrick, jointly with one Wharton Branch and John B. Sargent.

That said Wharton Branch and John B. Sargent failed to join in this writ of error, and that no cause is shown, or attempted to be shown, for the nonjoinder therein of the said Branch and Sargent.

Wherefore, Defendants in Error move the Court to dismiss said writ of error, with costs.

J. T. BRADY,
Of Counsel for Defendants in Error.

BRIEF

IN SUPPORT OF MOTION TO DISMISS WRIT OF ERROR.

General Statement.

This was a suit at law of trespass to try title, brought by the Defendants in Error against the Plaintiff in Error E. G. Hanrick, for the recovery of an undivided one-third interest in the lands in controversy, being all the interest in the same inherited by one Elizabeth O'Brien, of Ireland, from Edward Hanrick, deceased, who died seized of said lands in 1865.

It was alleged that the Defendant below, E. G. Hanrick, a nephew of the said deceased Edward, had also inherited from him a third interest in said lands, and that the other third interest was in the heirs of James Hanrick, deceased, a brother of the said Edward, who were not made parties to this suit.—Record pp. 5–7.

Before the trial, one Wharton Branch and one John B. Sargent, filed separate pleas in intervention, each claiming an undivided portion of the interest in said lands inherited by the said Elizabeth O'Brien by virtue of conveyances to themselves, under a power of attorney from her, executed anterior to the date of the deed from her to the Plaintiffs below, under which the latter claimed.

The jury found generally for the Plaintiffs below.

The judgment, after reciting the appearance of the Defendant E. G. Hanrick, and the intervenors Wharton Branch and John B. Sargent, proceeds:

"It is therefore ordered and adjudged by the Court, that the Plaintiffs Eliza M. O'Brien and Philip O'Brien and Wm. Brady, have and recover of the Defendant

Edward G. Hanrick, and of the intervenors Wharton Branch and John B. Sargent, one undivided one-third interest in and to the following described lands." * *

The writ of error is prosecuted by the Plaintiff in Error Hanrick, alone, and the record does not show that any attempt was made to join the other parties against whom the judgment was also rendered, nor does it disclose any reason for the nonjoinder of the same.

First Proposition.

The judgment rendered was a joint judgment against E. G. Hanrick, Wharton Branch and John B. Sargent, and since the record fails to disclose any reason for the nonjoinder of said Branch and Sargent, the writ of error must be dismissed.

Statement under First Proposition.

The Plaintiffs below claimed title in fee simple in themselves in all the tracts of land described in their petition to the extent of an undivided one-third interest, the same being the interest therein inherited by the said Elizabeth O'Brien, alleging in the language of of the statute, Art. 4786, R. S. 1879, Laws of Texas, the act of dispossession on the part of E. G. Hanrick, and praying for a judgment against him for an undivided one-third interest in said lands.—Record pp. 12, 13.

To this petition E. G. Hanrick filed a general denial, *a plea of not guilty*, and special defences.—Record p. 14.

Art. 4788, R. S. 1879, Laws of Texas, reads: "when a party is sued for lands, the *real owner* or warrantor

may make himself, or may be made a party defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action."

Art. 1188, *Id.*, reads: "The pleadings of an intervenor shall conform to the requirements of pleadings on the part of plaintiff and defendant respectively, so far as they may be applicable."

In accordance with these provisions, Wharton Branch and John B. Sargent filed separate pleas in intervention, styled by them "original answers," each containing a general denial of the allegations in the petition of Plaintiffs' below, and each containing a plea *of not guilty*. Each pleaded specially that said Elizabeth O'Brien and one John Hanrick and one James Hanrick, they being respectively the sister and brothers of the deceased Edward, executed a power of attorney in favor of Philip O'Brien, by virtue of which power of attorney said Philip conveyed to said Sargent an undivided one-half of the undivided interest of the principals in the lands in controversy, and to Wharton Branch an undivided one-fourth of the same, from which it appeared that Branch and Sargent together were entitled to an undivided three-fourths of the interest in said lands inherited by the said Elizabeth, the same being an undivided three-fourths of the interest sued for by the Plaintiffs below.—Record p. 20–21.

Branch and Sargent thus claimed to be the "real owners" of three-fourths of the interest sued for by the Plaintiffs below, and attempted to assert their rights to the same as provided for in said sections of the statute quoted, *supra*.

Art. 4794, *Id.*, reads: "Such plea," referring to the plea of *not guilty*, "or any other answer to the merits, shall be an admission by the Defendant, for the purpose of that action that he was in possession of the premises sued for, or that he claimed title thereto at

the time of commencing the action, unless he states distinctly in his answer the extent of his possession or claim, in which case it shall be an admission to such extent only."

It will be observed that Hanrick, Branch and Sargent each filed pleas of *not guilty*.

After the filing of the pleas in intervention, the Plaintiff below filed a supplemental petition replying to the same, and ending with the following prayer:

"The premises considered, Plaintiffs pray that they have and recover of the said Wharton Branch and John B. Sargent, as well as the said E. G. Hanrick, an undivided one-third interest in said lands described in said Exhibit A, and for all other relief, both general and special."—Record p. 37.

As stated, *supra*, the jury found generally for the Plaintiffs, and the judgment reads that "the Plaintiffs, Eliza M. O'Brien and Philip O'Brien and Wm. Brady, have and recover of the Defendant Edward G. Hanrick and of the intervenors Wharton Branch and John B. Sargent, one undivided one-third interest in and to the following described lands." * * *

Authorities.

That the judgment is joint: Simpson vs. Greeley, 20 Wall., 152; Masterson vs. Herndon, 10 Wall., 416; Burleson vs. Henderson, 4 Texas, 55; Schram vs. Gentry, Galveston term, 1885, Sup. Court of Texas; Smith vs. Gentry, *Id.*

That the writ of error must be dismissed: Simpson vs. Greely, 20 Wall., 152; Masterson vs. Herndon, 10 Wall., 416; O'Dowd vs. Russell, 14 Wall., 402; Hampton vs. Rouse, 13 Wall., 187; Williams vs. Bank, 11 Wh., 414. See also authorities under second proposition. See Field's Federal Courts, 296; 2 Abbott's U. S. Practice, 248, 250.

When the trial was had below, the case stood precisely as though Branch and Sargent had been made Defendants by act of the Plaintiffs. A joint judgment was sought against them jointly, and it was entered up in terms corresponding.

In Simpson vs. Greely, 20 Wall., 152, the Plaintiff below sues Simpson and eight others for certain lands, and judgment was given—

"That the Plaintiffs have and recover of and from said Defendants, the lands and tenements described in the declaration." * * Simpson only sued out a writ of error to the Supreme Court of the United States. It was held that this was a joint judgment and the writ of error was dismissed for nonjoinder of the others against whom the judgment was rendered.

In Masterson vs. Herndon, 10 Wall, 416, the Court below decreed that the complainant "have and recover of the said S. A. Maveric and the said J. H. Herndon, the tract of land in the bill described, and that their title to the same is hereby decreed to be free from all clouds cast thereon by the said Defendants."

This decree also was held to be a joint one, and Herndon, only, having appealed from it, the appeal was dismissed, the Court saying: "We dismiss this appeal with less regret, as there is still time to obtain another."

It may be urged that since the Defendant and the intervenors each filed separate answers and separate defences, the judgment is not a joint one. But the wording of the judgment, which is in response to the prayer of Plaintiffs' petition, precludes the possibility of its being several. If the judgment were several, then, for instance, it could be set aside, as to E. G. Hanrick, and permitted to stand as to Branch and Sargent. But suppose the Court below, at the instance of Han-

rick alone, had granted a new trial, would not the entire judgment be held for naught? Could the Plaintiffs below in such event have obtained a writ of possession against Branch and Sargent?

The question as to whether a judgment is joint or several, may thus be easily determined in our opinion by the effect on the judgment resulting from the granting of a new trial or a reversal at the instance of one of the parties against whom it is rendered.

If the granting of a new trial or the reversal of the judgment at the instance of one, results in the setting aside of the entire judgment to the benefit of all, then it is a joint judgment; otherwise it is several.

Ch. Justice Hemphill, in Burleson vs. Henderson, 4 Texas, 55, says: "The rule seems to be well settled that if a judgment be reversed as to one, it is so as to all," citing Cro. Jac., 303. "* * * This rule is subject, however, to several exceptions: as when there be more than one judgment, and they are distinct and independent of each other, the reversal of one will not affect the other. (2 Str. R., 807; 2 Bac. Abr. Error, m. p.; 2 Ach. Prac., 259) Or, if there be but one judgment and it consists of distinct and independent parts, it may be reversed as to one part and be good for the remainder."

And on the next page he says: "But notwithstanding these considerations, it appears to be the more convenient rule, that where a judgment is entire, when the judgments are not distinct and independent, or where the parties have not distinct and independent interests, (6 N. H. R., 547; 10 Mass. R., 68) and where the judgment operates to the prejudice of all the Defendants, a reversal as to one shall operate a reversal as to the whole."

In the case of Schram vs. Gentry, Galveston term, 1885, Sup. Court of Texas, (a certified copy of the

opinion being filed with this motion,) a suit of trespass to try title was brought by Gentry against Schram, Geo. H. Smith, and others, each of the Defendants holding separate parcels of the lands sued for. An interlocutory judgment by default was rendered against Smith, and on final hearing a judgment was rendered for Gentry against Schram, Smith and others, for the land in controversy. Schram and others appealed, but Smith did not join in the appeal. The judgment on this appeal was affirmed. Afterwards Smith sued out a writ of error, joinder on appeal or in writ of error of all parties against whom a judgment is rendered, not being necessary under the Texas practice. Smith, on his appeal, showed that the service in the Court below as to him was defective, and the judgment for this reason was reversed, not only as to him, but as to all—the ground of reversal necessarily being that the judgment was joint, and hence could not be reversed in part.—See Smith vs. Gentry, Galveston term, 1885, Supreme Court of Texas. A certified copy of this opinion is also filed with this Brief.

The judgment being joint, the authorities referred to directly under our first proposition, are conclusive to the effect that the writ of error must be dismissed.

Second Proposition.

The objection to nonjoinder of Branch and Sargent in the petition for writ of error, goes to the jurisdiction of the Court and may be made at any time.

Authorities.

Wilson heirs vs. Insurance Company, 12 Pet., 140;

Simpson vs. Greely, 20 Wall., 152; Semple vs. Hager, 4 Wall., 432; Masterson vs. Bank, 10 Wall., 416; 2 Abbott's U. S. Practice, 250.

Argument and Extracts from Authorities.

In Simpson vs. Greely, 20 Wall., 152, *supra*, the motion to dismiss was not presented until the case was reached for argument. The Court says: "Errors of a material character are assigned by the Plaintiff as reasons for the reversal of the judgment rendered in the State Court, but it is necessary *in the first place*, to examine the objection taken by the Defendants *to the jurisdiction of this Court*, as that objection presents a preliminary question which, if decided in favor of the Defendants, will dispose of the case."

In Wilson heirs vs. Insurance Company, 12 Peters, 140, where a motion to dismiss the writ of error for the reason that all the parties against whom the judgment was obtained, did not join in the appeal, was made after the case had been pending in the Supreme Court of the United States for two years, the Court says:

"In both cases referred to," referring to 8 Pet., 526, and 7 Pet., 529, "it appears that the motions to dismiss were not made at the first term, or at time of appearance in this Court, but each of the cases had been depending here two years before the motion was made. The rule of this Court, therefore, is, that when there is a substantial defect in the appeal or writ of error, the objection may be taken at any time before judgment on the ground that the case is not legally before us, and that we have not jurisdiction to try it. It follows that the writ of error in the case under consideration must be dismissed."

The following is from the syllabus in Semple vs. Hager, 4 Wallace: "Where a want of jurisdiction is

patent, or can be readily ascertained by an examination of the questions on the argument of the merits, this Court will entertain and act upon a motion to dismiss for want of jurisdiction."

Second Proposition.

Where a writ of error is illegally sued out on account of nonjoinder of others against whom a joint judgment is rendered, the defect can only be cured by dismissing the writ and bringing another in which all against whom the judgment is rendered are made parties.

Authorities.

Ex parte Mussina, 20 How., 280.

The following is from the syllabus in the above case: "Where a part of the persons against whom a decree has been rendered have appealed, the others cannot take another appeal. The first appeal should in such case be dismissed as irregular, and a new appeal taken in which all should join. If all will not, summons and severance."

Respectfully submitted,

J. T. BRADY,

Of Counsel for Defendants in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

E. G. HANRICK
vs.
E. M. O'BRIEN, PHILLIP O'BRIEN, and WILLIAM BRADY. } No. 256.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

MOTION TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION.

ADDITIONAL BRIEF IN SUPPORT OF MOTION.

STATEMENT OF THE CASE.

The defendants in error brought suit below against the plaintiff in error for an undivided one-third interest in certain lands held and claimed by him.

Wharton Branch and John B. Sargent, claiming to be the real owners of certain *undivided* interests in the *same lands*, "intervened" in this suit, under the law of Texas, made themselves, in the terms of said law, "parties *defendant* in the suit," and were entitled by said law to make, and did make, "such defense as if they had been the original *defendants* in the action."

Though this was nominally a suit at law, yet, in respect of this voluntary intervention and the subsequent relations of the

parties, it partook of the nature of a suit in equity. Both Hanrick, and Branch and Sargent, were defendants relative to O'Brien et al., and were also claiming adversely to each other. Each of these conflicting claims was for the *same piece of property*, or for an *undivided* interest in it.

Upon trial below the jury found a verdict generally "for the plaintiffs."

Judgment was accordingly entered "that the Plaintiffs, Eliza M. O'Brien and Phillip O'Brien and Wm. Brady, have and recover of the *Defendant Edward G. Hanrick, and of the intervenors Wharton Branch and John B. Sargent*, an undivided one-third interest in and to the following described lands. * * * *"

Bond is given and the Writ of Error prosecuted by Hanrick alone, and there is nothing in the record to show that the other defendants below, against whom, as well as against Hanrick, judgment was given, have refused to join in this Writ of Error.

ARGUMENT.

A judgment has been rendered, which, if carried out, will vest in the defendants in error an *undivided* interest in a certain property. This judgment was rendered against *three* persons, each of whom claimed and defended a title to an undivided interest in the same property. *One* of the three persons now calls said judgment in question, and seeks to have it reversed by Writ of Error, *without making of record an estoppel against the other two persons.*

This, it is submitted, is contrary to sound and well established legal principles. Before Hanrick can, *by himself alone*, question in this Court the validity of the judgment rendered in favor of the defendants in error, and against him and Branch and Sargent, it is submitted that the defendants in error are entitled to an *estoppel of record* against said Branch and Sargent.

In this Court it is the unquestioned practice, when the record of a controversy concerning a *unitary* subject matter comes

before it, upon writ of error or appeal, and all persons who, in the suit below, claimed an interest in said subject matter, are not *either parties to the appellate proceeding* or *estopped by the record* from questioning the settlement of the controversy, to hold that this Court has not jurisdiction. The dismissal of such writs or appeals follows.

It is sufficient to cite upon this point the leading cases of—

Williams *v.* Bank of the U. S., 11 Wheaton, 414.
Owings *v.* Kincannon, 7 Peters, 399.
Masterson *v.* Herndon, 10 Wall., 416.
Simpson *v.* Greeley, 20 Wall., 158.

The principal ground, if not the only ground, of opposition by the plaintiff in error to this motion is, that Branch and Sargent claim adversely to Hanrick, and, therefore, cannot be said to be joint defendants with him. In one sense this is true; but in the sense of having claimed the *same subject matter* (or an interest therein) as Hanrick; of having defended such claims *in the same suit*, and against *the same plaintiffs*, as did Hanrick; and of having encountered *the same adverse judgment* relative to the *same subject matter*, the intervenors, Branch and Sargent, are certainly joint defendants with Hanrick.

It is submitted that these latter considerations determine whether Hanrick, Branch, and Sargent ought to join in a writ of error. Whether, in opposing the plaintiffs below, they claimed in amity or adversely to each other, is not the proper test.

In the case of Todd et al. *v.* Daniel, 16 Peters, 521, it was said that *all* of the defendants below should join as appellants for the very reason that their rights between themselves might be distinct, or even *adverse*. The language of the Court upon this point was, p. 524:

"The case of Owings *v.* Kincannon, 7 Peters, 399, seems to have been misunderstood at the bar. The objection in that case was not that one or more of the defendants might not pursue an appeal for their own interest, if the others refused to

join in it upon due notice, and process for that purpose from the Circuit Court; but that it *did not appear* that all the defendants were not ready and willing to join in the appeal, and that the appeal was brought by some of the appellants without giving the others an opportunity of joining in it, for the protection of their own interests; *not only against the appellee, but against the appellants, as their own interests might be distinct from, or even adverse to that of the appellants;* and it was right and proper that *all* the parties should have an opportunity of appearing before the Court, so that *one final decree,* binding upon all the parties having a ***common*** interest, might be pronounced."

Since the case of Owings *v.* Kincannon, 7 Peters, 399, it has been held in this Court that by *appeals* from a decree in equity, as well as by writs of error, "the whole cause ought to be brought before the Court at the same time, and that all the parties united in interest ought to unite in the appeal." [Simpson *v.* Greeley, 20 Wall., 157.]

Now, in this case last cited, as well as the other decisions bearing on this point, the terms "united in interest," or "having a common interest," include not only such parties as have a joint interest *at law*, but also all parties that claim, *in the same suit,* the whole or any part of *an undivided, unitary, subject matter.*

In *appeals* to this Court all parties that claim the same property must unite as appellants and be united as appellees, in order that the action of this Court upon the decree below may determine the rights of, and bind, all claimants to the property.

Now, to argue, as does the plaintiff in error in opposition to this motion, that because the intervenors in this case are adverse in interest to Hanrick they need neither be joined in this writ of error, nor be estopped by the record, is to argue that in the case of any appeal from a decree which adjudicates the rights of several defendants claiming the same property adversely to each other, it would be competent for this Court to proceed to pass upon the decree at the instance of one only of such defendants without requiring the *record* to show an abandonment of the appeal by the others.

Yet, in many equity suits several defendants below are found claiming a single piece of property adversely to each other, and to hold that in any such suit the decree might be affirmed or reversed on the appeal of *one* of such defendants without regard to the others, would defeat one of the principal objects of suits in equity, namely, to gather together and adjudicate *in one suit* the rights relative to a single subject matter, of as many parties as possible.

The Statute of Texas, (quoted in Mr. Brady's brief,) under which Branch and Sargent made themselves "parties defendant" in this suit below, is a law directed to the consolidation of suits. Under its provisions the titles of Hanrick, Branch, Sargent, and of the defendants in error, to a certain single, undivided property, have been adjudicated below in one suit and judgment. To separate these parties now on writ of error and readjudicate the titles of some of them relative to this property without concluding by the record further appellate proceedings by the others, relative to the same property, would defeat the beneficial object of the Texas Statute.

This is also the policy of the laws of the United States, and of this Court. [Forgay et al. *v.* Conrad, 6 How., 201, especially page 206.]

In Masterson *v.* Herndon, 10 Wall., 416, the necessity for adjudicating all matters in a single judgment was very forcibly stated. The Court said:

"We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other, that is, it would enable the court below to execute its decree, so far as it could be executed, on the party who refused to join, *and it would estop that party from bringing another appeal for the same matter.* The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed."

Simpson *v.* Greeley, 20 Wall., 158, was a case in which the claims of several parties to certain lands were settled. The Court said:

"Each defendant is interested in every part of the judgment.

"Viewed in the light of these suggestions, it is quite clear that the writ of error in this case must be dismissed, as all the defendants are directly or indirectly affected by the judgment in respect to the damages and rents, issues and profits, as well as *the judgment that the title to the lands described in the declaration is in the present defendants.* Such a controversy cannot be properly re-examined here by instalments, nor unless all the parties to be affected by the result are before the court."

Simpson *v.* Greeley, 20 Wall., 158.

In the cases relied upon by the plaintiff in error, in which motions of the present character were denied, it is believed that it will be found that the judgment or decree below related to several pieces of property, in some cases specific sums of money, in which the various parties below were separately interested.

If this judgment be an entirety, and binding in every part upon every party below, it will not avail to defeat this motion to argue that Branch and Sargent, the non-joined parties, are already barred by lapse of more than two years from hereafter questioning the judgment below—

1st. Because to argue that would not give jurisdiction to this Court.

2d. Because the defendants in error are entitled by sound principle and precedent to an estoppel *of record* against non-joined parties.

3d. Because there are exceptions to the rule that a writ of error can not be brought after two years, one of which exceptions may operate to excuse Branch or Sargent for longer delay.

The judgment of the Court below in favor of the defendants in error is presumptively correct. If the plaintiff in error

would question it he must comply with the rules governing writs of error, and present a clear record to this Court which shall properly estop the other parties who are interested in and affected by the whole judgment, from hereafter questioning it.

H. N. Low,
Of Counsel for Defendants in Error.

[The attention of the Court is also respectfully called to the brief of Mr. Brady in support of this motion.]

119-156

Office Supreme Court U. S.
FILED.
OCT 12 1885
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF UNITED STATES,

OCTOBER TERM, 1885.

No. 256.

E. G. HANRICK, PLAINTIFF IN ERROR,

vs.

ELIZA M. O'BRIEN, PHILIP O'BRIEN AND WILLIAM BRADY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF OF L. W. GOODRICH,

OF COUNSEL FOR PLAINTIFF IN ERROR, OPPOSING MOTION TO DISMISS WRIT OF ERROR.

STATEMENT OF THE CASE.

PLAINTIFF'S PLEADINGS.

The defendants in error, Eliza M. O'Brien, Philip O'Brien and William Brady, who were plaintiffs in the court below, brought suit against Edward G. Hanrick, who is the plaintiff in error to recover an undivided one-third interest in several large tracts of land. The petition was filed February 13, 1880, and was in the usual form of an action of trespass to try title under the Texas statute. It alleged title in one Edward Hanrick, who

died, seized in 1865, leaving surviving him as his only heirs one sister, Elizabeth O'Brien, and two brothers, John and James Hanrick, and Edward Hanrick, the defendant, son of a deceased brother. That said Elizabeth, John and James, were aliens, residing in Ireland and were natural born subjects of the Queen of the United Kingdom of Great Britain and Ireland. That John died an alien and without issue in 1870. That James died an alien in 1875, and left surviving him children and grandchildren, all of whom still reside in Ireland except Nicholas, Annie and Ellen Hanrick, who reside in the state of New York. That on the day of , 1870, a general public law was enacted in said Kingdom of Great Britain which expressly confers on all aliens to said Kingdom all the rights of natural born subjects both in and to the acquisition, taking, holding and disposition of real and personal property situated in said Kingdom, and expressly declared that a title to said property in said Kingdom should be derived from, through or in succession to an alien in the same manner as from a natural born subject of said Kingdom. That under said law a citizen of the United States is entitled to all the rights of natural born subjects both in and to the taking, holding and disposition of said property situated in said Kingdom, and that title to real and personal property in said Kingdom may be derived through, from or in succession to a citizen of the United States in the same manner as though from, or in succession to a natural born subject.

That on the day of , 1878, the said Eliza (?) O'Brien was, by virtue of the facts herein before shown, seized and possessed of an undivided one-third interest in and to said estate of the said Edward Hanrick, deceased, and in and to the said tracts of land before described. That on said day the said Eliza (?) O'Brien conveyed to the plaintiff, Eliza M. O'Brien all her right, title and interest in and to the said lands for her separate use, she being the daughter-in-law of the grantor. That by virtue of said conveyance and by virtue of other convey-

ances from and under the said Eliza O'Brien, of Ireland, the said Eliza M. O'Brien was on the day of , A. D. 1878, seized and possessed in her own separate right of an undivided one-third interest. That on the day last named the said Eliza M. O'Brien, joined by her husband, Philip O'Brien, for a valuable consideration, conveyed to plaintiff, William Brady, one-half of said undivided interest, and thereby said William Brady became seized of an undivided one-sixth interest in said lands. That on the 1st day of January, 1879, the said plaintiff, Eliza M. O'Brien, joined by her husband, Philip O'Brien, and the said William Brady, were by virtue of the facts herein before stated, seized and possessed in fee simple of an undivided one-third interest in and to the lands herein before described. That of the said, to-wit, on said day last mentioned, the defendant, Edward G. Hanrick, unlawfully entered and ejected plaintiffs to their damage $50,000.

Plaintiffs prayed for judgment recovering of said defendant an undivided one-third interest in said lands and for costs.

The Plaintiffs from time to time filed various amendments and finally on October 3, 1882, filed their fourth amended petition, the substance of which is above set out, withdrawing all former pleading. Said fourth amended petition does not differ materially from the original petition.

DEFENDANT'S PLEADINGS.

The defendant, Edward G. Hanrick, filed his answer to the original petition April 8, 1880, and to the fourth amended petition April 3, 1883.

Among other matters of defense he set up: (1) The non-joinder of all parties in interest as shown by the petition. (2.) The alienage of plaintiffs vendor, Elizabeth O'Brien. (3.) He pleaded not guilty. (4.) He claimed title in himself to parts and parcels of the lands sued for and set out the boundaries of his claim. (5.) He pleaded in bar the statute of limitation.

INTERVENER'S PLEADING.

April 4, 1883, Wharton Branch filed his petition of intervention styled, "Original Answer."

It recites that he appears as a party. Demurs to plaintiff's petition. He pleaded not guilty and avers that Elizabeth O'Brien, James and John Hanrick did, on May 16, 1870, execute to Philip O'Brien their certain power of attorney, whereby they jointly and severally authorized and empowered said Philip O'Brien to sell and convey their said interests in the said estate of Edward Hanrick, deceased, and coupled said power with an interest in said estate and made the same thereby irrevocable. That February 14, 1878, said Philip O'Brien, for valuable consideration did, acting for himself and his said wife, Eliza O'Brien, and his said principals, Elizabeth O'Brien and James and John Hanrick, sell and convey to this defendant one undivided one-fourth of three-fourths of said estate, by deed with full covenants of warranty.

He also averred that at the time of making said deed to him the said Philip O'Brien agreed and undertook to cure all defects in said power, if any existed, and in pursuance of such agreement obtained conveyances from all parties in interest, the said Philip taking such conveyances in the name of his wife, and averred that the title so conveyed enured directly to the benefit of this defendant, the vendee of said Philip O'Brien.

The plea concluded with a prayer that he have judgment against all parties to the suit establishing his right and that he have same set apart to him in severalty.

Record, p. 20.

On the same day, viz: April 4, 1883, John B. Sargent filed a similar plea, claiming by deed from said Philip O'Brien one-half of the shares originally belonging to Elizabeth O'Brien, John and James Hanrick, and concluded with prayer for judgment establishing his right against all parties and for possession.

Record, p. 21.

PLAINTIFF'S REPLICATION.

April 4, 1883, the plaintiffs objections to the petitions of intervention having been overruled, they filed a plea styled, "Plaintiffs First Supplemental Petition."

Record p. 24, as follows:

And now come plaintiffs in the above entitled cause, and with leave of the court first had, file this their first supplemental petition, and excepting to said so styled "answer" respectively filed by the said John B. Sargent and Wharton Branch, say the same are insufficient in law for the following reasons, viz:

1. Because the same presents no cause of action against the plaintiffs.

2. Because the same presents no cause of action against the defendant. Then follows a general denial of all the allegations in said so styled "answers" filed by said Sargent and Branch except wherein the truth of the same is herein after expressly admitted.

The plea then sets out the facts leading to the execution and delivery of the deeds to Sargent and Branch alleges fraud and failure of consideration, and concludes with a prayer that plaintiffs have and recover of the said Wharton Branch and John B. Sargent as well as the said Ed. G. Hanrick an undivided one-third interest in said lands.

Record, p. 24-37.

THE JUDGMENT.

The jury returned their verdict as follows, viz: We, the jury, find for the plaintiff.

"It is therefore ordered and adjudged by the court that the plaintiffs, Eliza M. O'Brien, and Philip O'Brien, and William Brady have and recover of the defendant, Edward G. Hanrick, and of the intervenors, Wharton Branch and John B. Sargent, one undivided one-third interest in and to the following described lands * * *

* * * * * * * * * *

and it is further ordered that a writ of possession in favor of plaintiffs issued therefor, and that plaintiffs do have

and recover of such intervenors such costs by them incurred by reason of such intervention, and of defendant all costs which were incurred herein, not including any costs incurred by the said intervention for which execution may issue."

Rec., 47-49.

BILLS OF EXCEPTION.

Separate bills of exception were reserved by the defendant, Edward G. Hanrick, and granted by the court. No joint bill was tendered or allowed. The defendant's bills of exception present questions antagonistic to both plaintiffs and the intervenors.

THE WRIT OF ERROR.

The writ of error recites as follows, viz:

"Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the circuit court before you, at Waco, between Eliza M. O'Brrien, Philip O'Brien and William Brady, plaintiffs, and E. G. Hanrick, defendant, and John B. Sargent and Wharton Branch, intervenors in said cause (No. 14 on the docket of said court setting at Waco), a manifest error hath happened to the great damage of the said E. G. Hanrick, defendant, as by his complaint appears," etc.

Rec., p. 99.

BRIEF.

From the foregoing statement it appears that the judgment obtained by the plaintiff is in no sense a joint judgment against the defendant, Hanrick, and the intervenors, Sargent and Branch.

The rights of the several parties as shown by the record, are distinct and adverse.

Both the plaintiffs and the intervenors asserted the same right, viz: The right of Elizabeth O'Brien, of Ireland, who was a common source of title for both, against the Defendant, Hanrick, who claims adversely to both, and the remaining part of the controversy was between plaintiffs and the intervenors as to which of them was the owners of the title which both asserted against the defendant, and the judgment is an adjudication of the ad-

verse conflicting claims of the parties and will be construed in connection with the pleadings.

AUTHORITIES.

A judgment is defined as being, "The decision or sentence of the law pronounced by a court or other competent tribunal upon the matter contained in the record."

Freeman on judgment, § 2. The entry of the judgment is a ministerial act, § 2. In the case of Germain *v.* Mason, 12 Wall, 259, the court says:

"We have examined the record—a very confused one—but from it we gather enough to satisfy us that the judgment of which German complains is such a separate judgment against him as authorizes him to ask a review of it here without joining his co-defendants in the court below, who have not thought proper to disturb the judgment."

In the case of Masterdon *v.* Herndon, 10 Wall, 416. The court looked into the record to determine whether the decree was joint or several.

See also on this point, Mussina *v.* Cavazos, 6 Wall, on page 361.

Day *v.* Washburn, 23 How, 309.

Todd *v.* Daniel, 16 P., 523.

In Hampton *v.* Rouse, 13 Wall, 187, it appears that three persons were defendants in action of ejectment. and that the bill of exceptions on which the writ of error was sued out was tendered by them jointly. The writ of error was prosecuted by one only of the joint defendants. The writ was dismissed.

The authorities are numerous that where the *interest* is joint all must join in the writ, and it is equally well settled that where the interests are separate or where they are joint and several the interested party may prosecute the writ to protect such interest.

Basket *v.* Hassell, 107 U. S.; Rep. 602 and cases cited.

In the case of Simpton *v.* Greeley, 20 Wall, 152, cited by counsel for the motion in this cause, the court say on page 157:

* * * That it was correct as matter of principle that the whole cause ought to be brought before the court at the same time, and that all parties united in interest ought to unite in the appeal. * * *

Again on same page the court say:

"Cases arise beyond all doubt where only one of several defendants is affected by the judgment or decree and it is well settled that in such cases the party whose interest only is affected by the alleged error, may carry up the case without joining the others in the appeal or writ of error," and citing Forgay *v.* Conrad, 6 How, 203; Germain *v.* Mason, 12 Wall, 261, and Cox *v.* United States, 6 Pet., 182.

In Milner *v.* Meek, 5 Otto, 258, it was held where one party appeals, if the appeal brings so much of the case and such of the parties as are necessary for a determination of his rights, the appeal will not be dismissed.

In the present case the intervenors, Sargent and Branch, would not be heard to urge as error the rulings made by the lower court, as exhibited by the bills of exception tendered by the defendent in this case for the reason that their right rests upon the correctness of such ruling.

Said intervenors could assign error only as to such rulings as were made against them in their controversy with the plaintiffs.

The intervenors were in no sense defendants in this cause. They were actors and came into court on their own motion to assert a right against both plaintiff and defendant.

They could not claim the benefit of Article 4788, of the revised statutes, quoted by counsel on page 4 of his brief. There was no privity between and the defendant. As to him they were not the *real owners* or warrantors. He was in possession, asserting an independent right in himself and denying equally the right asserted by plaintiffs and intervenors.

L. W. GOODRICH,
Of Counsel for Plaintiff in Error.

119-156

OCT 20 1885

In the Supreme Court of the United States.

E. G. HANRICK
vs.
E. M. O'BRIEN *et al.*
No. 256.

MOTION TO DISMISS.

Brief of W. Hallett Phillips, in answer to Motion.

The record in this case was docketed by the plaintiff in error August 16, 1883. The defendant in error has waited more than two years until the case is about to be heard on its merits, before making the present motion to dismiss, on the ground of the non-joinder in the writ of error of certain parties to the cause. If the writ of error should now be dismissed, the plaintiff in error would be barred from bringing another writ, by lapse of time.

The action below was one of trespass to try title, and was brought in the United States Circuit Court by O'Brien and others against Hanrick as the party in possession claiming title to all the land sued for.

On April 6, Hanrick answered denying the right of the plaintiffs to recover. Rec. 4.

Afterwards Wharton Branch and John B. Sargent filed their petitions in the cause. These are styled in the record "original answers."

In the petitions, Branch and Sargent set up title in themselves to a part of the land sued for by the plaintiff, and they pray judgment against all parties to the suit establishing their title, and to have the land to which they are entitled set apart to each in severalty and for general relief. Rec. 21, 22.

To these petitions the plaintiffs filed what is in form an answer in equity, and which seeks to have the deeds held by Branch and Sargent declared void for false representations and fraud. p. 24–37.

Branch and Sargent claimed title under the same grantor as the plaintiffs.

The defendant, Hanrick, claimed adversely to both the plaintiffs and Branch and Sargent.

There was a general verdict in favor of the plaintiffs, and a judgment that "the plaintiffs recover of the defendant, Edward G. Hanrick, and of the interveners, Wharton Branch and John B. Sargent, one undivided one-third interest in and to the following-described land. * * * And it is further ordered that a writ of possession in favor of the plaintiffs issue therefor; and that the plaintiffs do have and recover of such interveners such costs by them incurred by reason of such intervention, and of defendant all costs which have been incurred, not including any costs incurred by the said intervention, for which let execution issue." p. 48.

To reverse this judgment, Hanrick, the defendant, prosecutes this writ of error, which the defendants in error move to dismiss on the ground of the non-joinder of Branch and Sargent.

Hanrick alone gave a bond to stay the judgment. p. 98.

Undoubtedly, the general rule is, that when a judgment against defendants is joint, all the parties affected thereby must join in the writ of error, or there must be a summons and severance or its equivalent.

This general rule proceeds upon the principle that all the parties who are *united in interest* ought to unite in the writ of error, and that the court should not be required to decide for the second time the same question on the record. An additional reason is that the successful party should be allowed to proceed against the parties who are shown to be satisfied with the judgment by refusing to join in the writ.

Owings vs. *Kincannon*, 7 Pet., 402;
Todd vs. *Daniels*, 16 Pet., 523;
Masterson vs. *Howard*, 10 Wall., 416.

We submit that this general rule lends no support to the present motion.

(1.) The interveners, Branch and Sargent, cannot be considered defendants, nor are they so termed in the judgment. They claimed against both the defendant and the plaintiffs, and their title was hostile to both.

The Circuit Court in permitting the intervention and according relief against the interveners, appar-

ently followed the Texas State practice, which confounds the distinctions between law and equity. The intermingling of the two jurisdictions was animadverted on by this Court, in *Hurt* vs. *Hollingsworth*, 100 U. S., 100.

(2.) The defendant Hanrick and the interveners were not united in interest, and the judgment as to them is severable. The judgment might be entirely right as to the one, and erroneous as to the others. Hanrick has a distinct and separate claim to the property adverse to the titles held by all the other parties.

The plaintiffs could proceed and enforce the judgment as to the interveners, without effecting the question of their right to recover against Hanrick, whose defenses were different from those set up by the interveners. The action was against Hanrick as the party in possession, and the interventions were for the purpose of establishing the titles of the interveners as to certain portions of the land against both Hanrick and the plaintiffs, and for the recovery of possession.

Under these facts, we submit that it is plain the motion should not be granted.

In legal effect the judgment as it stands is against the defendant Hanrick and the interveners for the land which they respectively claimed.

Ex. Parte French, 100 U. S., 1.

We call the attention of the court to the brief of our associate Mr. Goodrich.

W. HALLETT PHILLIPS,

Of Counsel for plaintiff in error, on Motion.

119-156

Supreme Court U. S.
FILED
APR 2 1886
JAMES H. McKENNEY,

In Supreme Court of the United States.

OCTOBER TERM, 1885

No. 256.

E. G. HANRICK, PLAINTIFF IN ERROR,

vs.

ELIZA M. O'BRIEN *et al*, DEFENDANTS IN ERROR.

ERROR TO CIRCUIT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR THE PLAINTIFF IN ERROR.

L. W. GOODRICH,
Of Counsel for Plaintiff in Error.

Brooks & Wallace Steam Print, Waco.

In Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 256.

E. G. HANRICK, PLAINTIFF IN ERROR,

vs.

ELIZA M. O'BRIEN *et al*, DEFENDANTS IN ERROR.

ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

Feb. 13, 1880, the defendants in error, Eliza M. O'Brien and her husband, Philip O'Brien, and William Brady, brought suit against Edward G. Hanrick the plaintiff in error, to recover an undivided one-third interest in three tracts of land described in their petition.

They allege that one Edward Hanrick, died, seized in 1865; that he left surviving him as his sole heirs two brothers, James Hanrick and John Hanrick, and one

sister, a widow, Elizabeth O'Brien, and one nephew, Edward G. Hanrick the defendant, the child of a deceased brother, Philip Hanrick.

That John Hanrick died intestate and without issue, in 1871, in Ireland, a citizen of the United Kingdom of Great Britain and Ireland, and an alien to the United States.

That James Hanrick died intestate in 1875, also an alien, leaving surviving him five children, and four grand children—naming them. That administration on the estate of said Edward Hanrick, deceased, has been long since closed, and said lands have not been partitioned among his heirs.

That by virtue of the general public, statutory laws of the United Kingdom of Great Britain and Ireland, all the rights of citizens, and natural born subjects of said Kingdom, in the acquisition, taking, holding, and disposition of real and personal property, are expressly conferred on aliens, and that by virtue of such laws a citizen of Texas or of the United States is entitled to all the rights in and to real and personal property situated in said Kingdom that a citizen of said Kingdom is entitled to; and a title to said property may be derived through, from, or in succession to a citizen of the United States in all respects as though, from, or in succession, to a citizen of said Kingdom.

That on the.....day of.....A. D., 1878, the said *Eliza* O'Brien, of Ireland, was by virtue of the above facts, seized of one undivided one-third of said lands, and that on said day she conveyed her right to the plaintiff, Eliza M. O'Brien. That afterward, Eliza M. O'Brien, joined by her husband, Philip, conveyed to William Brady, an undivided one-half of her interest.

That Eliza M. O'Brien, together with William Brady,

were seized and possessed of an undivided one-third of said land. That afterward, the defendant, Edward G. Hanrick, unlawfully entered and ejected said plaintiffs, &c

Prayer for judgment and writ of possession.

This petition was endorsed as follows, viz:—"This action is brought as well as to try title as for damages."

The defendant, E. G. Hanrick, appeared and filed his answer, April 6, 1880, as follows :

(1) He objected first that all persons interested were not made parties.

(2) He set up the disability of alienage of plaintiffs vendor.

(3) Limitation of nine years.

(4) He excepted to that part of the petition which alleges that in 1870 a public law was enacted in the United Kingdom, removing disability of alienage, because such laws can have no effect upon rights vested before its passage.

He also pleaded the general issue.

These exceptions were considered by the Court, Oct. 9, 1880, and overruled, and the questions are presented in a Bill of exceptions, on page 49 of the record

Afterward, viz : Aug. 4, 1882, the plaintiffs filed their "*Third amended petition*" in lieu of their former pleading. By said plea they made one, Ed J. Gurley, also a party defendant, jointly with Edward G. Hanrick, and sued to recover a one-third interest in the same three tracts of land described in their original petition, and a like interest in four other tracts, all of which are described. They also sue for rents and other damages.

This petition set up substantially the same right as the original petition, except that it is alleged that Eliza

O'Brien, of Ireland, conveyed to plaintiff, Eliza M. O'Brien, by "*deed of gift.*" p. 6.

Citation was issued Aug. 5, 1882, and was duly served on E. J. Gurley, Aug. 7, 1882.

And afterwards, on Oct. 3, 1882, plaintiffs filed their "*Fourth amended original petition,*" in which they dismiss as to Ed. J. Gurley, and withdraw their third amended petition and sue to recover a one-third interest in *three* tracts of land, which are described. p. 9.

In all other respects the petition is the same in substance as the three which precede it, except that it is alleged that the conveyance to the plaintiff, Eliza M. O'Brien, was made for the separate use and benefit of the said Eliza, April 3, 1883, the defendant Edward G. Hanrick filed his answer to said fourth amended petition.

(1) He pleaded in abatement that large portions of the land sued for were occupied by persons claiming title thereto in themselves adverse to both plaintiffs and defendants, and set out the names of such persons. This plea, upon motion of plaintiffs was struck out by the Court, and the questions presented by said plea are saved by a Bill of exceptions, on page 50 of the record.

The defendant also demurred, and pleaded the general issue. Also pleaded in bar, the statute of limitation, and described the boundaries of his claim. p. 13.

And afterwards, viz: April 4, 1883, one, Wharton Branch, of Galveston, Texas, and one, John B. Sargent, of Boston, Massachusetts — each filed their separate answers or petitions of intervention, by which they in effect claimed the interest sued for by plaintiffs, by deeds to them, made prior to the deeds under which plaintiffs claimed. p. 20 + 21

The intervention of these parties was opposed by

the plaintiffs, who filed a sworn plea, April 4, 1883, in which among other grounds they say that the consideration of the deeds under which intervenors claim have wholly failed. That a suit is now pending in the District Court of Galveston county, to cancel said deeds. The objection of the plaintiffs were overruled, and the plaintiffs thereupon filed a plea styled "Plaintiffs first supplanted petition," April 5, 1883. (On page 24 of the record.) p. 23.

This plea is very lengthy, covering with the exhibits twenty-three pages of the printed record. In substance it averred that the plaintiff, O'Brien, was induced to make deeds to said Sargent and Branch, through fraudulent misrepresentations made by them. That said deeds were made by O'Brien by virtue of a power of attorney executed to him by John and James Hanrick and Elizabeth O'Brien.

That the execution of said deeds was unauthorized by the power, and that the consideration for which said deeds were executed had wholly failed.

The plea concluded with a prayer for recovery against said Branch and Sargent, and Ed. G. Hanrick, for an undivided one-third interest in the land described in exhibit A. p. 37.

Thereupon the defendant, E. G. Hanrick, on the 5th day of April, 1883, moved to dismiss because it appeared that plaintiff's right could be heard only in a court of equity, and that this court has no jurisdiction. But the court over-ruled the motion and the question is here presented by bill of exceptions. p 3 2 4 5-3

The defendant, E. G. Hanrick, also urged special exceptions to the sufficiency of said plea, which were also over-ruled by the court, to which ruling a bill of exceptions was granted. p 5-3.

The parties went to trial before a jury, and in the progress of the trial the plaintiffs offered in evidence, as part of their title, a deed purporting to be executed by Eliza M. O'Brien, of Ireland, to Eliza M. O'Brien, one of the plaintiffs. The admission of this deed as evidence was objected to by defendant Hanrick on various grounds; but the court admitted the deed in evidence, and questions arising on said ruling is here presented by bill of exceptions. The defendant, Hanrick, in the further progress of the cause for the purpose of proving an outstanding title superior to plaintiffs' title, offered to read, in evidence to the jury, a deed made by defendant, Hanrick, to one E. J. Gurley, dated June 1st, 1871, conveying an undivided one-third of the land in controversy to said Gurley, and in connection with said deed offered to prove by a witness on the stand that in 1858 the deceased, Edward Hanrick, had put said Gurley in actual possession under a contract to give him one-third of said land for his services as counsel and agent, that said Gurley had remained in possession up to this time, and that the deed offered in evidence was in consumation of said contract, but upon plaintiff's objection, said evidence was excluded, and the point is presented here by bill of exceptions. Extions were also reserved to the charge of the court and to the refusal of the court to instruct the jury as prayed by defendant.

There was a trial which resulted in a verdict for the plaintiffs, and a judgment was entered that plaintiffs recover of and from defendant, Hanrick, and of the intervenors, Branch & Sargent, an undivided one-third of the land, being same described in plaintiff's 4 thamended petition, and the defendant, E. G. Hanrick, sued out a writ of error.

ASSIGNMENT OF ERRORS.

(1) The court erred in over-ruling the defendant's demurrer and exceptions to plaintiff's original petition,

setting up the defence of alienage.—See bill of exception on page 49 and 50 of the Record.

(2) The court erred in striking out the defendant's plea in abatement for want of proper parties.—See bill of exceptions, page 50 of Record.

(3) The court erred in over-ruling defendant's motion to dismiss this cause for want of jurisdiction, the title and right sued on being equitable and not legal.—See bill of exceptions No. 3, page 52.

(4) The court erred in over-ruling defendant's exceptions to plaintiff's first supplemental petition, as shown in bill of exceptions, page 53, Record.

(5) The court erred in admitting in evidence the deed purporting to have been executed by Eliza O'Brien, of Ireland, to Eliza M. O'Brien, one of the plantiffs—see deed set out in full on pages 56, 57 and 58—because 1st, The said deed, so far as the same was propounded as the deed of Elizabeth O'Brien, had been impeached as a forgery by the affidavit of Wharton Branch, a party to the record. 2nd, Because the said deed did not purport to be the deed of Elizabeth O'Brien, nor did the same purport to vest title in Eliza M. O'Brien to hold as her separate property, and 3d, because of the unexplained erasures and changes appearing on the face of said deed.—See bill of exceptions beginning on page 56, Record.

(6) The court erred in admitting, in evidence, the testimony of Philip O'Brien to show that no consideration was paid for the above mentioned deed, and that said deed was intended as a gift to his wife, Eliza M. O'Brien, because said deed is in law a deed to the community, and subject to the control and disposition of the husband, and a trust in favor of a separate right could not at law, be engrafted on it by parol testimony.—See bill of exceptions, page 62.

plaintiffs' right is not defeated or qualified by anything advanced by either the defendant or the intervenor, and to that extent if no further, you will find for the plaintiffs (if you have found that said Eliza O'Brien and the said Elizabeth are the same person)." 12 97

BRIEF.

1. The question of alienage raised by the first assignment of error will be discussed under the eighth assignment.

2. In support of the second assignment of error attention is respectfully called to the facts stated in second bill of exceptions, beginning on page 50 of the record.

It appears that a large number of persons were in the actual adverse possession of various parts and parcels of the land sued for by plaintiffs, claiming full and absolute title in themselves to the extent of their several holdings. That their names as well as the nature of their several claims were well known to plaintiffs. The plea gives the names of quite a number of persons so holding, one class of whom claim to derive their titles from Edward Hancock, deceased (the alleged ancestor of plaintiffs); a second class who have been in the exclusive adverse possession of the several parcels claimed by them for more than ten years, and a third class who held when this suit was brought, and now hold and occupy in severalty parts and parcels of the land sued for, claiming title in themselves.

It also appears that E. J. Gurley, who resides in

Falls County, is now and has been for more than ten years last passed, jointly with defendant Hanrick, occupying the lands claimed by defendant, and described in his plea (see pages 15 to 20 of record) under a claim of title in himself, to an undivided one-third interest therein; that he claims to have acquired his possession and right from the deceased, Edward Hanrick, in 1858, and has continuously held, occupied, improved, used and claimed said interest adversely to plaintiffs and has jointly with defendant occupied said lands.

It is also shown that Nicholas, Annie and Ellen Hanrick and others claiming as heirs of James Hanrick are asserting by suit in the District Court of Falls County a right to an undivided one-third interest in said land, and it is averred that all of these persons are necessary parties.

These facts were presented by a sworn plea in abatement filed in the due order of pleading.

The plaintiffs objected to said plea as follows, viz: That said plea presents no merits and shows no cause sufficient in law why the parties named therein are necessary parties defendants or why the same should be made parties; and the court sustained the objections and struck out the plea. Rec. p. 52, bill of exceptions No. 2.

The Revised Civil Statutes of Texas, page 703, provides as follows, viz:

Art. 4784. "All fictitious proceedings in the action "of ejectment are abolished and the method of trying "titles to lands, tenements or other real property shall "be by action of trespass to try title."

Art. 4790. "The defendant in the action shall be "the person in possession if the premises are occupied, "or some person claiming title thereto in case they are "unoccupied."

On the subject of limitation the Revised Civil Statutes of Texas provides as follows, viz:

Art. 3194. Any person who has the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued and not afterward.

Art. 3196. Whenever, in any case, the action of a person for the recovery of real estate is barred by any of the provisions of this chapter, the person having such peaceable and adverse possession shall be held to have full title precluding all claims.

The plea of not guilty * * * * "shall be an admission by the defendant for the purpose of that action that he was in possession of the premises sued for, or that he claimed title thereto at the time of the commencement of the action, unless he states distinctly in his answer the extent of his possession or claim, in which case it shall be an admission to such extent only." Rev. Stat., Art. 4794.

Under this article the defendant, E. G. Hanrick, had defined by filed notes the extent of his claim of title and possession. Page 14 of Record.

Neither the plaintiffs nor the intervenor joined issue on this plea, but it was struck out on motion of plaintiffs as insufficient. Rec. pp. 50 and 51.

Walker *v.* Read, 59 Tex., 191.

ARGUMENT.

It cannot be doubted that a plaintiff may, in this form of action, recover the possession of land from which he has been unlawfully dispossessed, or that he may recover the possession of such land by virtue of the right which he has under title paramount, although he has never, in fact, had the actual possession.

The statute does not require that the petition shall state the plaintiff's right in other than general terms, but does require to be stated the real names of the plaintiff and defendant and their residence if known.

The statute abolishes all fictitious proceedings and provides a form of action by which the right of land may be tried between the real parties who claim it.

We submit that the persons actually occupying and claiming portions of the land sued for, whose names are shown by the plea, were, under our statute, proper parties, and that the plaintiffs in this cause were bound to accept the disclaimer of the defendant Hanrick or make said persons parties, and litigate the right with them.

We submit also that Nicholas Hanrick and others claiming as the heirs of James Hanrick, deceased, were necessary parties.

The plaintiffs claimed by virtue of title cast by descent on their vendor, Elizabeth O'Brien. There was no prior possession by them, nor had their vendor ever made entry as heir. The fact of heirship was alleged and to be established as well against the children of James Hanrick as against the defendant, E. G. Hanrick. The allegation presented an issue which the alleged co-heirs of Elizabeth O'Brien, all had a right to contest before the jury. The plea shows that the children of James Hanrick, deceased, are claiming an interest in the same land sued for by plaintiffs, and we submit that they are necessary parties, and if they refuse to join the plaintiffs in the suit that fact should be alleged and they should be made defendants.

Again the plea shows that E. J. Gurley was in possession of the land sued for, holding jointly with the defendant, Hanrick, under a claim of title in himself to an undivided one-third interest therein; that he claims to have acquired his possession and right from Edward Han-

rick, deceased, in 1858, and has continuously held, occupied and claimed adversely to plaintiffs.

The record also shows that plaintiffs by their third amended petition joined said Gurley as defendant; that he was duly cited and that on the third day of October, 1882, plaintiffs dismissed as to him.

I respectfully submit that said Gurley was not only a proper party, but he was an indispensable party. The possession which he held jointly with the defendant was challenged, and by the operation of the judgment to be obtained by the plaintiffs, was to be disturbed and broken. Again if it be true as alleged by the plea, that the said Gurley had acquired a right from Edward Hanrick, deceased, in his lifetime, to an undivided one-third interest, then only a two-thirds interest descends to his heirs and the plaintiffs would be entitled to a one-third of two-thirds, or two-ninths of the whole, instead of one-third, as claimed by them.

AUTHORITIES.

Sedgwick & Wait, on trial of title to land, § 231 and cases cited in note.

The 3rd assignment of error presents the question of the right of the plaintiffs to maintain the suit, it being contended their right as shown by their pleadings is equitable and not legal. See 3rd, Bill of exceptions, pages 52 and 53, record.

Although it has been held that trespass to try title may be maintained in the State Courts, on an equitable title, it is the rule in the Federal Courts that such an action can be maintained only on a legal title.

Fenn vs. Holme, 21. How, page 482.
Green vs. Myers, 24. How, page 268.
Smith vs. McCann, 24. How, page 398.
Jones vs. McMasters, 20. How, page 22.

Singleton vs. Tanchard. 1st Black, page 342.

Bennys' Lessee vs. Chesapeake & Ohio Canal Co. 8–Pet. 214.

In this case the plaintiffs in their original and various amended petitions, pleaded their title specially as follows, viz: That Edward Hanrick died, seized in 1865, intestate, leaving as heirs, two brothers, James and John; one sister, Elizabeth O'Brien, and one nephew, the son of a deceased brother, Edward G. Hanrick, the defendant.

That John Hanrick died in 1871, unmarried, and without children. That James Hanrick died in 1875, leaving children and grand children surviving.

That by virtue of these facts the said *Eliza* O'Brien was on the.....day of.....A. D., 1878, seized of an undivided one-third interest. That on said day the said Eliza O'Brien, conveyed to the plaintiff, Eliza M. O'Brien, for her separate use and benefit, and that by virtue of said conveyance, and by virtue of other conveyances, from, and under the said Eliza O'Brien, of Ireland, the said Eliza M. O'Brien, was on the.....day of.....A. D., 1878, seized in her own separate right. That on said day, the said Eliza M. O'Brien, joined by her husband, Philip O'Brien, conveyed to plaintiff, Wm. Brady, one-half of the said undivided interest, and that thereby, the said Wm. Brady became seized. That on the 1st day of Jan., 1879, the said plaintiffs, Eliza M. O'Brien, joined by her husband, Philip O'Brien, and the said Wm. Brady, were by virtue of the facts herein before stated, seized and possessed in fee simple, of an undivided one-third interest, &c. That afterward the defendant, Edward G. Hanrick, unlawfully entered upon and dispossessed plaintiffs, &c., to plaintiffs damage, $50,000. Prayer for judgment.

Rec. page 9,–13.

The petition was endorsed "This action is brought as well to try title as for damage." This is the substance of

of all the pleadings of the plaintiffs, against the defendant, Edward G. Hanrick, and is sufficient in an action at law.

Pilcher vs. Kirk. 55 Tex., page 215.

In Bridges vs. Cundiff 45 Tex., bottom page 443., the Court says: The plaintiffs in their pleadings, made no effort to set out the commencement or derivation of their title. They aver in general terms their ownership, and their legal seizen and possession, and under their averments it was certainly competent for them to prove a grant to their father, or their father and mother, and that they had under the laws of descent inherited from them.

In Edgar vs. Galveston City Co. 46 Tex., page 430.

After reciting the allegations of plaintiff's petition, the Court say:

"These parts of the petition exhibit a good cause of action, and must be so held, unless the petition contains other allegations that constitute a defence to it."

See also, Hill vs Allison, 51 Tex., page 390.

In this cause we respectfully submit that the facts averred in the plaintiff's supplemental petition do constitute a good defence to the cause of action stated in plaintiff's petition, and the various amended petitions.

It is alleged in said supplemental petition(1)that Eliza O'Brien, of Ireland, John Hanrick and James Hanrick, executed and delivered a power of attorney to Philip O'Brien, authorizing him to sell and convey their interest.

"Rec. page 25." Said power of attorney is made an exhibit to said supplemental petition. "Rec., page 42."

(2) That by virtue of said power, the said Philip

O'Brien, did on the 1st day of Feb., A. D., 1878, execute and deliver to one, William Jenkins, the deed described n Exhibit O, attached to said petition. "Rec., page 27."

The deed contained in exhibit O, page 37, purports to be a conveyance by:

James Hanrick, John Hanrick, and Elizabeth O'Brien, all of the county of Waxford, Ireland, in consideration of one dollar and other valuable considerations, paid by William Jenkins, of Boston, the receipt whereof is hereby acknowledged, do hereby give, bargain, sell, and convey unto the said William Jenkins, Jr., his heirs and assigns, all the right, title, and interest, which we, or any of us have in, or to the following described tracts of land situated in the State of Texas, which belonged to Edward G. Hanrick, late of Montgomery, State of Alabama, deceased, viz:

Then follows a description of seven tracts of land' including land sued for, and described in plaintiffs petition. The deed also contains covenants of seizen, and right to convey, and of general warranty, and was executed by the grantors, by their attorney in fact, Philip O'Brien. Rec., page 38.

(3) That on the same day, said Jenkins conveyed all of said land to Eliza M. O'Brien, wife of Philip O'Brien. R. 27

(4) That the said Eliza M. O'Brien, on the same day, conveyed by deed, to said John B. Sargent, for a valuable consideration, an undivided one-half interest in same land.

Rec., page 27. (A copy of this deed is set out in bill of exceptions on page 84 of "Rec."

(5) That the consideration of the deed to Sargent was the promise of Sargent that he would advance the money necessary to defray the expenses of estab-

lishing in the Courts the legal rights of his grantors, and furnish them a home during the progress of the litigation. Rec., page 27.

(6) That said Philip O'Brien and Sargent, for the purpose of carrying out said agreement, visited the said Branch, at Galveston, Texas, and that said Branch advised them that said apparent conveyance by Eliza O'Brien, of Ireland, by her agent, the said Philip, to the said Jenkins, was void, because unauthorized by the terms of said power of attorney, and the aforesaid three deeds were marked cancelled, and considered by all parties as null and void. "Rec., page 28."

(7) That the said O'Brien, in consideration of the promise of the said Sargent and Branch that they would advance the money necessary to pay cost of court, lawyers' fees and incidental expenses, necessary to the contemplated litigation, executed the two deeds attached, marked Exhibit X and Y, and made a part of said supplemental petition. (These exhibits are found on pages 39, 40 and 41 of record.) Exhibit X is a conveyance by Philip O'Brien, acting for himself and for his wife, Eliza M. O'Brien, and for James Hanrick, John Hanrick and Elizabeth O'Brien, heirs of Edward Hanrick, deceased, in consideration of one dollar paid by Whorton Branch, besides other good and valuable considerations convey to said Branch an undivided one-fourth interest in all the property of the estate of Edward Hanrick, deceased, situated in Texas, Edward Hanrick being the administrator of said estate and entitled to one-fourth thereof. Then follows description of lands conveyed. Then follows covenant of general warranty deed, dated February 14, A. D. 1878.

Pages 39 and 40.

Exhibit Y is a conveyance by same parties to John B Sargent in consideration of one thousand dollars, to be

paid by Sargent, conveys one undivided half interest of grantor's interest in the estate of Edward Hanrick, deceased, grantor's interest being three-fourths thereof. Then follows description of land and covenants of seizen and rights to convey and of general warranty. Dated Feb. 14, 1878.

Pages 40 and 41, Record.

(8) That for the purpose of more equitably adjusting between themselves the burden of said consideration to be borne by each respectively, the said Sargent did then and there execute in favor of Branch, and deliver to him the deed, copy of which is in Exhibit W, attached and made a part of this petition, wherein Sargent conveys to Branch one-half of the undivided interest in said estate, apparently conveyed to him by said Philip O'Brien said instrument' described in Exhibit X.

Rec. p. 29.

(9) That in consideration of the promises made to him by Sargent and Branch, the said Philip did sign and acknowledge the deeds set out in Exhibit X and Y, provided the same should not take effect as deeds or be recorded or otherwise used as deeds until said Sargent and Branch has evidenced a disposition to comply in good faith with their said promises, and said deeds were, after being signed and acknowledged, placed in the hands of Branch, subject to above condition. p 31

(10) That said three deeds described in Exhibits W, X and Y, were drawn up and signed at the same time and place. p 31

(11) That at the time of signing said three deeds set out in Exhibits W, X and Y, the said John Hanrick and James Hanrick were dead, of which fact the said Branch and Sargent were fully informed.

Rec., page 32.

(12) That the said Eliza O'Brien, of Ireland, never did in any manner ratify said conveyances to said Branch and Sargent, but, on the contrary, she ignored the same, and did on the —— day of May, 1878, execute a deed to said Eliza M. O'Brien; and plaintiffs charge that said deeds to Branch and Sargent are void, because the same were executed for considerations unwarranted by the terms of said power of attorney. R. 33.

(13) That should the court be of the opinion that said apparent conveyances to Branch and Sargent are not void on account of the considerations for which the same were executed, being unauthorized by the said power, and therefore void, then plaintiffs further complaining, say, etc.

Here follow allegations in substance that both Sargent and Branch had failed to perform the promises alleged to have been made by them as the consideration of said deeds.

Rec., page 33.

There appears also interspersed throughout said supplemental petition various scandalous and impertinent matter and charges of fraud against Sargent and Branch, but as this was an action at law, in which the plaintiffs, if they recover, must do so upon the strength of their *legal* title, it is hardly necessary to investigate said charges, and to determine whether or not they are sufficient to avoid said deed in a court of equity.

It will be found, however, that the above synopsis does contain all of the material allegations of said supplemental petition in regard to the execution and delivery of the deeds made in Boston by Philip O'Brien under his power of attorney, and by him and his wife, Eliza M. O'Brien. as well as by him, in Galveston, in his own behalf and as attorney in fact of his wife and John and James Hanrick and Elizabeth O'Brien. And it is respect-

fully urged that the allegations of plaintiffs' pleadings do show that plaintiffs were not seized, as alleged by them, but that before said suit brought, viz: February 1, 1878, O'Brien and his wife, Eliza M. O'Brien, did by their deed for a valuable consideration convey to Sargent, with covenants of seizure and good right to sell and convey, and of general warranty of title.

Rec., page 27 and 38.

The effect of this deed was to vest in Sargent as against the said Philip O'Brien and his wife, Eliza, an undivided one-half of three-fourths of the estate of Edward Hanrick, deceased, and their covenants of seizure of right to convey and of general warranty, estopped them from ever after asserting to the contrary.

AUTHORITIES.

Harrison *vs.* Boring, 44 Tex., 256.
Citing. VanRensslaer *vs.* Kearney, 11 How, 322.
See also, Smith *vs.* Shuly, 12 Wall, 358.
Comstock *vs.* Smith, 13 Pick, 116.

Also reported in 23 Am., Dec., page 670. (See also cases referred to in note, page 673.)

But the supplemental petition alleged that this deed was by the consent of Philip O'Brien, Sargent & Branch, marked cancelled, and considered by them null and void, —see page 28—and that O'Brien then executed another deed purporting to convey to Sargent the same interest.

It is alleged that this substituted deed was not delivered to Sargent, but after being signed and acknowledged was delivered to Branch, and that Sargent then and there made and delivered to Branch a deed conveying part of the same interest to O'Brien, also at the same time made and delivered to Branch another deed conveying to Branch a part of the interest still claimed by O'Brien.

The legal effect of these deeds was to convey to Sargent and to Branch the interest specified if O'Brien then had or should afterwards acquire such interest.

(See authorities last cited.)

The allegation that the deed executed to Sargent in Boston was marked cancelled, and considered null and void, did not have the effect to divest out of Sargent the estate conveyed by said deed. p. 28

Washington *vs.* Ogden, 1 Black, 451.

Nor could the allegation that the deed executed and delivered by O'Brien to Branch in Galveston was delivered as an escrow, limit, or control its legal effect. p 31

A. Lott *vs.* Kaisar, et. al., 61 Tex., 665.
Miller *vs.* Fletcher, 21 Am. Rep., 356.
Also in 27 Gratt, 403, and cases discussed in opinion.

Nor could the allegations that the promised considerations which induced the execution of the deeds by O'Brien to Sargent, and to Branch, in Galveston, had not been performed by Sargent or by Branch have any effect upon the legal effect of said deeds. p. 35

East Line R. R. Co. *vs.* Garrett, 52 Tex., 133.
Rainey *vs.* Chambuns, 56, Tex., 17.
G. H. & S. A. R. R. Co. *vs.* Pfeuffir, 56 Tex., 66.

Nor could the allegations of fraud contained in said supplemental petition, even if sufficient in a court of equity, be heard in a court of laws for the purpose of avoiding said deeds, it appearing that the same had been voluntarily executed and delivered with full knowledge of their legal effect.

Jones *vs.* McMasters, 20 How., 22.
Lott *vs.* Kaiser, et al, 61 Tex., 665.
Connolly *vs.* Hammond 51 Tex., 647.

Nor could the grantor, O'Brien, set up his own fraud, or want of authority for the purpose of avoiding said deeds.

Hudson *vs.* Morris, 55 Tex., 595.

Nor could William Brady who acquired his title from O'Brien and wife by subsequent deed join O'Brien and wife in a suit to avoid the prior deeds.—Brady is neither a creditor nor subsequent purchaser for value without notice.

Crocker *vs.* Bellanger, 70 Am. Dec., 489. and note (also reported 6 Wis. 645.)

Fowler *vs.* Stonum, 11 Tex., 478.

Lehmberg *vs.* Bibarstain, 51 Tex., 457.

However unauthorized or fraudulent such prior deeds may have been as to James Hanrick, John Hanrick and Elizabeth O'Brien, such deeds did not effect Brady, who had then no interest. Evidently the legal effect of the conveyance to Brady is to be controlled by the legal effect of the prior conveyances if his grantors, O'Brien and wife to Sargent and Branch. It is therefore respectfully submitted that before the date of the institution of this suit, ~~viz~~:

On the 13th day of February, A. D. 1880, The plaintiffs, O'Brien and wife, Eliza M. O'Brien, had conveyed to Sargent by deed with full covenant. Also that O'Brien professing to act for himself and for his wife, Eliza M., and for his principals in said power, had made another deed to Sargent to the same effect and upon the same considerations that Sargent had thereupon conveyed a part of his interest to Branch, and that O'Brien at the same time conveyed a part of his remaining interest to Branch. And it also appears by the plaintiffs petition, that these deeds were duly delivered to the grantors and were sufficient as against O'Brien and wife and those who claimed under them to convey to Sargent one-half of three-fourths of the estate of Edward Hanrick, deceased,

and to Branch one-fourth of three-fourths of said estate, equivalent in all to nine-sixteenths of said estate.

It is alleged in said supplemental petition that at the time of making said deeds both James and John Hanrick were dead.

Record, page 32.

And it is also alleged that Eliza O'Brien, of Ireland, did not by word or act ratify said deeds, and did afterward, on the ——— day of May, 1878, convey her interest to Eliza M. O'Brien.

See page 33.

And, so far as the pleadings show this is all the interest in the estate of Edward Hanrick, deceased, that O'Brien had lawful power to convey notwithstanding the convenants in his deeds above recited.

FOURTH ASSIGNMENT.

This assignment of error is submitted upon the Record without argument.

See Bill of Exceptions on page 53, Record.

FIFTH ASSIGMMENT.

In support of the fifth assignment of error, it is respectfully submitted that the three several objections urged by defendant to the admission in evidenee of the paper purporting to be the deed of Eliza O'Brien, of Ireland, to Eliza M. O'Brien, wife of Philip O'Brien, were good, and should have been sustained.

The plaintiff, in making title from Edward Hanrick, deceased, their alleged ancestor, proved, as alleged in their petition, that Elizabeth O'Brien was a sister of said deceased, and then offered to read in evidence as a recorded instrument a paper purporting to be an original deed by Eliza O'Brien, of Ireland, to Eliza Mercy

O'Brien, wife of Philip O'Brien, reciting a consideration of one dollar paid, said deed conveyed all the right, title and interest of the grantors, and is dated May 11, 1878, and is signed Eliza O'Brien.

Rec., pages 56, 61.

The Revised Statutes of T[illegible] fol-
im-
lar-
to
be-
eth
M.
in
ied
d;
he
p-

"Art. 2257. Every instrument of writing which is ermitted, or required by law to be recorded in the office the clerk of the County Court, and which has been, or ay be so recorded, after being proven or acknowledged the manner provided by the laws in force at the time its registration, shall be admitted as evidence without e necessity of proving its execution; provided that e party who wishes to give it in evidence shall file the me among the papers of the suit in which he proposes use it, at least three days before the commencement of e trial of such suit, and give notice of such filing to the posite party or his attorney of record; and unless ch opposite party, or some other person for him, shall thin three days before the trial of the cause, file an idavit stating that he believes such instrument of iting to be forged. * * * * *"

in
e.

at
as
9

[illegible] deed being signed *Eliza* O'Brien did not purport to convey the estate of Elizabeth O'Brien.

Nor did the deed on its face purport to vest title in Eliza M. O'Brien to hold as her separate property, as alleged in plaintiff's petition.

Rec, page 12.

and to Branch one-fourth of three-fourths of said estate, equivalent in all to nine-sixteenths of said estate.

It is alleged in said supplemental petition that at the time of making said deeds both James and John Hanrick were dead.

Record, page 32.

The plaintiff, in making title from Edward Hanrick, deceased, their alleged ancestor, proved, as alleged in their petition, that Elizabeth O'Brien was a sister of said deceased, and then offered to read in evidence as a recorded instrument a paper purporting to be an original deed by Eliza O'Brien, of Ireland, to Eliza Mercy

O'Brien, wife of Philip O'Brien, reciting a consideration of one dollar paid, said deed conveyed all the right, title and interest of the grantors, and is dated May 11, 1878, and is signed Eliza O'Brien.

Rec., pages 56, 61.

The Revised Statutes of Texas, ——, provide as follows: Article 2257.—Under that law defendant impeached said deed as a forgery by the affidavit of Wharton Branch (Rec., page 61), and thereupon objected to the introduction of said deed on that ground, and because it did not purport to be the deed of Elizabeth O'Brien, nor did it purport to vest title in Eliza M. O'Brien to hold as her separate property, as alleged in plaintiff's petition; and third, because of the unexplained changes and erasures appearing on the face of said deed; but the court overruled the objections and admitted the deed in evidence to the jury, and granted a bill of exceptions.

Rec., page 62.

ARGUMENT.

First. That the said deed could not be received in evidence as a recorded instrument under that statute. The article already quoted is conclusive.

Second. The allegation and the proof being that the name of the deceased Edward Hanrick's sister was Elizabeth (see plaintiff's petition second bottom page 9 and top page 10), and the deed being signed *Eliza* O'Brien did not purport to convey the estate of Elizabeth O'Brien.

Nor did the deed on its face purport to vest title in Eliza M. O'Brien to hold as her separate property, as alleged in plaintiff's petition.

Rec, page 12.

AUTHORITIES.

Rogan *vs.* Williams, 63 Tex., 123.
Kirk *vs.* Navigation Co., 49 Tex., 213.
Wallace *vs.* Campbell, 54 Tex., 87.

Third. The objection to the admission of said deed in evidence because of the unexplained erasure and charges apparent on the face of said deed it is submitted should have been sustained. It is recited in the bill (Rec., page 61) that upon the face of said deed it appeared that whenever the name of the grantors was mentioned in the body of said deed the name as originally written was Elizabeth O'Brien, and that a portion of said name had been scratched, or erased, so as to read Eliza O'Brien, of which no note of explanation or emendation appeared in said deed. When it is remembered that the allegations and the proof is that the name of the grantor is Elizabeth O'Brien (see the recital in the bill, Rec., p. 56), and that the name as originally written in the body of the deed was Elizabeth, it seems that some explanation should be required to show why the deed was signed Eliza and is now propounded as the deed of Elizabeth.

It is true that in the further progress of the case there was evidence before the jury tending to prove that Elizabeth O'Brien and Eliza O'Brien was one and the same person (Rec., page 62), but the court admitted the deed in evidence independent of this testimony, and refused to submit the issue to the jury.

Rec., page 63.

SIXTH ASSIGNMENT.

In support of the sixth assignment of error the Revised Civil Statutes of Texas provides as follows, viz :

Art. 2852. All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, shall be deemed the common

property of the husband and wife and during the coverture may be disposed of by the husband only.

In the case of Cooke *v.* Bremond, 27 Tex., 460, the court says:

"But we know of no principle upon which such evidence can be received for the purpose of explaining or modifying such deeds after the property has passed into the hands of innocent purchasers and thereby engrafting upon it a trust to their detriment. Such a doctrine would go far to destroy the utility of written evidences of title to land, and the registration of conveyances for the purpose of notice. The alleged fact that the defendant in error examined the deed to Mrs. Cooke before he purchased the lots is immaterial. The inspection of a deed only charges a party with notice of the facts which its contents impart.

"An inspection of this deed authorized the defendant in error to infer that the property was a part of the community estate of Cooke and wife and justified him in dealing with it as such. The statute authorizes the husband during its continuance to dispose of all community property; that the title of it when acquired by the community was taken in the name of the wife, imposes no additional burthen upon the purchaser of inquiring as to the equities of the husband and wife in respect to it." See also Smith *v.* Boquet, 27 Tex., 507.

This is the well settled rule of property in Texas.

Veramendi *v.* Hutchins, 48 Tex., 550.
Johnson *v.* Harrison, 48 Tex., 268.
Kirk *v.* Navigation Co., 49 Tex., 213.
French *v.* Strumberg, 52 Tex., 109.
McCamley *v.* Thorp, 61 Tex., 650.
Morrison *v.* Clark, 55 Tex., 437.
Rogan *v.* Williams, 63 Tex., 123.

In the case last cited the court say:

Parol evidence is not admissible to show that a deed which, on its face, is a deed of gift to the husband and

wife, was really for the consideration of natural love and affection to the wife.

SEVENTH ASSIGNMENT OF ERROR.

The deed of Eliza O'Brien, of Ireland, to Eliza M. O'Brien (p. 56 Rec.), having been impeached as a recorded instrument, it was an issue before the jury whether or not the said deed had been executed by Elizabeth O'Brien, upon whom it was alleged in plaintiff's petition, descent was cast by the death of her brother, Edward Hanrick.

It was a controverted fact. There was proof *pro* and *con* (see bill of exception on page 62) and it was a question for the jury to pass on, and counsel for defendant, E. G. Hanrich, requested the court to instruct the jury that to make said deed operative to convey the interest of Elizabeth O'Brien, it devolves upon the plaintiffs to prove that she, in fact, executed said deed by signing her name Eliza O'Brien.

The court refused to so instruct the jury and signed a bill of exception. P. 63 Rec.

In support of the 8th assignment of error, It is respectfully urged that the court erred in not instructing the jury to return a general verdict for the defendants as prayed for by counsel for E. G. Hanrick.

Record, page 97.

The substance of all the testimony before the jury is recited in the bill beginning on page 65 of the Record, and therefrom it appears Edward Hanrick died in the State of Alabama in 1865, unmarried and without issue.

(2) That he left surviving one nephew, defendant, E. G. Hanrick, a native of Alabama, also two brothers, James Hanrick and John Hanrick, and one sister, Elizabeth

O'Brien, all then residing in Ireland, and aliens to the United States.

(3) John Hanrick died intestate in Ireland an alien in 1871, without issue and unmarried.

(4) James Hanrick died intestate in Ireland, an alien in 1875 and left surviving him children and grand-children, among whom was his son, Nicholas Hanrick, who resides in the State of New York at the date of the death of Edward Hanrick in 1865.

(5) Elizabeth O'Brien still lives in Ireland, an alien.

(6) In May, 1870, the British Parliament enacted in effect that aliens should, in said kingdom, have all the rights of natural born subjects as to the descent and inheritance of real and personal property, but specially provided that the act should not affect estates where descent was cast before the passage of the act.

(7) Previous to this time the rule of the common law had prevailed in said kingdom, and by the common law aliens could not inherit or cast descent.

(8) Plaintiffs produced a deed to Eliza M. O'Brien, wife of Phillip O'Brien and signed Eliza O'Brien, dated May 11th, 1878 reciting a valuable consideration and purporting to convey the land in controversy.

(9) Plaintiffs also produced a deed dated Nov. 27, 1878 made by Phillip O'Brien and his wife, Eliza M. O'Brien, to William Brady, recites a valuable consideration and conveys all the undivided one-half interest of *any equity of title* that we may have or acquire in and to the following described tracts, etc., and describes the land in controversy.

The plaintiffs also offered testimony tending to prove that Elizabeth O'Brien was sometimes called Eliza O'Brien and sometimes signed her name Eliza O'Brien, and Phillip

O'Brien testified that said deed was intended as a gift to his wife, and that no consideration was paid for it.

(1) Defendant's evidence—Land Office copy of grant to T. J. Chambers for five leagues of land, dated April, 1832.

(2) A second grant of five leagues of land to said Chambers dated July, 1834, both grants being by the Government of Coahuilla, and Texas.

(3) The defendants then showed title in one Lane to all that part of both of said grants which conflicted with the De la Serda grant. (This being part of the land in controversy.)

(4) Deed by said Lane to the defendant, E. G. Hanrick, conveying above land, dated February 1st, 1877. This deed recites a pending litigation and that the deed is made in consideration of a compromise.

(5) It was proved that said Chambers grants conflict with the De la Serda grant and the boundry of such conflict, and that the deed of said Lane to Hanrick covered about 9,400 acres of said conflict.

(6) The defendant read in evidence a general power of attorney, dated May 16th, 1870, executed by John Hanrick, James Hanrick, and Elizabeth O'Brien to Phillip O'Brien, authorizes said O'Brien to sell and convey, to sue and be sued, to suffer non suits or default, to compromise, to appoint, substitute and to revoke at pleasure. This provides very full and complete.

(7) Deed of John Hanrick, James Hanrick and Elizabeth O'Brien to Wm. Jenkins, Jr., dated February 1, 1878, executed by Phillip O'Brien by virtue of above power, recited valuable consideration, conveys land in controversy. And it was admitted on the trial that the land conveyed by above deed was on same day conveyed to Eliza M. O'Brien, wife of Phillip O'Brien.

(8) Deed by Phillip O'Brien and Eliza M. O'Brien to John B. Sargent, dated February 1, 1878, recited valuable consideration and conveys an undivided one-half of all the right, title and interest conveyed to grantors by Jenkins, includes the land in controversy.

(9) Deed by Phillip O'Brien in his own right, and as agent of his wife and as attorney in fact for James Hanrick, John Hanrick and Elizabeth O'Brien to John B. Sargent, dated February 14, 1878, and is same in substance as the deed last above mentioned.

(10) Deed by same grantors as last above to Wharton Branch, dated February 14th, 1878, recites valuable consideration and conveys an undivided one-quarter interest of, in and to all the property of the estate of Edward Hanrick, deceased, in Texas.

(11) Deed by John B. Sargent to Whorton Branch. dated February 14, 1878, conveying for a valuable consideration an undivided one-half of grantor's interest in estate of Edward Hanrick, deceased.

(12) Deed by Nicholas Hanrick and wife to Eliza M. O'Brien, dated August 21st, 1877, recites a valuable consideration and conveys all of grantor's interest in estate of Edward Hanrick, deceased.

(13) Deed by Ellen Hanrick to Eliza M. O'Brien, dated April 3, 1878. Same in form and substance as deed last above mentioned.

(14) Deed by Honora Hanrick to Eliza M. O'Brien, dated April 3d, 1878, same in form and substance as deed last above mentioned.

(15) Deed by Edward Hanrick to Falls County, dated September 1st, 1854, conveys 640 acres of land, part of the De la Serda grant in controversy.

(16) Deed by Edward Hanrick to B. G. Shields,

dated Sept. 4, 1854. Conveys 300 acres of land, part of the De la Serda grant.

(17) The defendant then proved that on December 1st, 1860, Edward Hanrick instituted suit in the United States Circuit Court, at Austin, Texas, against David Barton and others in possession, and against T. J. Chambers to recover a tract of eleven leagues of land known as the De la Serda grant, that the case was continued generally until January, 1867, when the death of plaintiff was suggested and the suit was revived in the name ot Edward G. Hanrick as sole heir and administrator, and in June, 1868, said Chambers having died, his administratrix, Abby Chambers, appeared as landlord of the other defendants and defended. She set up title under the before mentioned two grants of five leagues, each made to her intestate. That the suit finally resulted in a verdict and judgment against the plaintiff.

(18) The defendant Hanrick then proved that he, his agents and tenants held actual possession of the tracts of land sued for since 1867, that he improved it, cultivated it, paid taxes on it, and jointly with his co-tenant E. J. Gurley, has since held the same adversely to all others.

(19) It was proven that defendant, E. G. Hanrick, was by the Probate Court of Falls County in 1867 appointed administrator of the estate of Edward Hanrick, deceased, that he returned an inventory, and that the last order made by said Probate Court in said estate was in 1869, that the papers of said estate were burned with the court house, and that said administrator was never formally closed.

(20) Evidence was also before the jury tending to sustain the allegations in plaintiff's supplemental petition filed April, 1883, and evidence was also before the jury tending to rebut the facts alleged in said plea.

ARGUMENT.

This testimony sustains two distinct grounds upon which the court should have directed a verdict for the defendants.

(1) Alienage of Elizabeth O'Brien through whom plaintiffs claim.

(2) Conveyances by Phillip O'Brien and wife, Eliza M. O'Brien before the institution of this suit.

(1) As to the question of alienage.

The constitution of the Republic (1836) provides for the introduction of the common law in Texas as follows, viz :

Art. iv, Sec, 13. "The Congress shall, as early as possible, introduce by statute the common law of England, with such modifications as our circumstances in their judgment may require ; and in all criminal cases the common law shall be the rule of decision."

Accordingly Congress, on January 20, 1840, enacted as follows, viz :

"That the common law of England (so far as it is not inconsistent with the constitution or the acts of Congress now in force) shall, together with such acts, be the rule of decision in this Republic and shall continue in full force until altered or repealed by Congress.".

Pas. Dig. of Laws, Art. 978. This law still remains in force. Rev. Stat. 1879, Art.

The Supreme Court of Texas has held in many cases that the rule of the common law with respect to aliens was the law in Texas, except as modified by statute.

Cryer *v.* Andrews, 11 Tex. 170
Barclay *v.* Cameron, 25 Tex. 232
White *v.* Sabriego, 23 Tex., 243.

The rule of the common law on this subject is thus stated by the court in Hardy *v.* De Leon, 5 Tex., 242: "For the law is that where a person dies leaving issue who are aliens, the latter are not deemed his heirs at law, for they have no inheritable blood and the estate descends to his next of kin who have inheritable blood, in the same manner as if no such alien issue were in existence." Citing Orr *v.* Hodgson, 4 Wheat., 453.

The legislation on this subject in Texas has been very brief.

The constitution of the Republic (1836), Sec. 10, General Provisions, provides as follows, viz:

* * * * * "No alien shall hold land in Texas except by titles emanating directly from the government of this Republic. But if any citizen of this Republic should die intestate or otherwise, his children or heirs shall inherit his estate, and aliens shall have a reasonable time to take possession of and dispose of the same in a manner hereafter to be pointed out by law."

Pas. Dig. Laws, Vol. 1, p. 37.

January 28, 1840, Congress passed an act regulating descents and Sec. 14 of said act reads as follows, viz:

Sec. 14. In making title to land by descent it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate, is or hath been an alien; and every alien to whom any land may be devised or may descend, shall have nine years to become a citizen of the Republic and take possession of such land, or shall have nine years to sell the same before it shall be declared to be forfeited, or before it shall escheat to the government.

Thus the law was, from 1836 until the annexation of Texas and the adoption of the constitution of 1845.

Many cases have been before the courts where descent was cast during this period of time, and it has been

held that the effect of the constitutional provision and the law before recited was to enable aliens to inherit equally with citizens, subject only to the right of the State to forfeit the same after nine years.

Barclay *v.* Cameron, 25 Tex., 232.
Cryer *v.* Andrews, 11 Tex. 171

It was also held in many cases where the alien heirs upon whom descent was cast were citizens of the United States, that they became immediately upon the annexation of Texas, entitled to the same rights as the citizens of Texas.

Babb *v.* Carroll, 21 Tex., 770.
Cryer *v.* Andrews, 11 Tex. 171.
Osterman *v.* Baldwin, 6 Wall., 116.

In Barclay *vs.* Cameron, 25 Tex., 232, descent was cast by the death of Cameron in 1841. The contest was between two sisters of the deceased, aliens, residing in Scotland, and Barclay, an uncle of the deceased, and at the time a citizen of the United States, residing in Virginia, and up to the time of the annexation of Texas an alien to the republic. The opinion contains quite a full discussion of the common law as modified by the constitutional provision and the statute above quoted.

The same questions are also discussed in McKinney *vs.* Saviego, 18 How, 235.

In both of the above cases it is held that the right of the alien depended upon the constitutional provision and the statute above quoted.

Upon the annexation of Texas the constitution of 1845 superceded the constitution of the late republic.

This constitution contained no reference to aliens, but by its terms retained in force all laws and parts of laws not repugnant to the constitution of the United

States, etc., until they expire by their own limitation, or shall be altered or repealed.

Article XIII, sec. 3, Pas. Dig. Laws, page 72.

The above quoted section, 14 of the law of 1840, regulating descents therefore remained in force as the rule when descent had been cast, while the constitution of 1836 was in force; and afterward, March 18, 1848, in altering our laws regulating descents, the same section was adopted and made section 9 of that law.

The language is precisely the same, even to the word *Republic*.

Pas. Dig. Laws, vol. 1, page 105.

The full text of the act will be found in same volume, beginning on page 558.

Section 5 of the act is as follows, viz:

Sec. 5. No right of inheritance shall accrue to any person whatsoever, other than to children of the intestate, unless they be in being and capable in law to take as heirs at the time of the intestate's death.

The re-enactment of section 14 of the act of 1840 as part of the act of 1848 carried with it the construction that had been placed upon it, which was simply to give reasonable time to aliens to take possession of the inheritance specially conferred on them by the constitution of 1836, and this might have occurred at any time before the adoption of the constition of 1845, and this law, so far as it was authorized by the constitution of 1836, expired by its own limitation nine years after said constitution was abrogated by the adoption of the constitution of 1845, to-wit: in 1854.

From the 29th day of October, 1845, when Texas became a part of the United States, until February 13, 1854, there was no law conferring on aliens the right to

inherit real estate in Texas, except in cases where, as a part of the United States, she became bound by treaties made by the United States with foreign powers.

The case of Hamenstein *v.* Lynham, 10 Otto, p. 483, furnishes a good illustration of a right claimed by an alien, a native of Switzerland, under a treaty between the United States and the Swiss confederation.

But if it be conceded that said section 9 of the act of 1848 regulating descents does by its terms confer upon aliens a right to inherit real estate, we submit that no such effect could be given to said section at the time descent was cast in this case by the death of Edward Hanrick in 1865.

Previous to this time, viz: Feb. 13, 1854, the legislature of Texas passed an act entitled:

An act to define the civil rights of aliens.

Section 1. Any alien being a free white person shall have and enjoy in the State of Texas such rights as are or shall be accorded to American citizens by the laws of the nation to which such alien shall belong, or by the treaties of such nation with the United States

2. Aliens may take and hold any property, real or personal, in this State by devise or descent from any alien or citizen in the same manner in which citizens of the United States may take and hold real or personal estate by devise or descent within the country of such alien.

(3) Any alien being a free white person, who shall become a resident of this State, and shall in conformity with the naturalization laws of the United States, have declared his intention to become a citizen of the United States, shall have the right to acquire and hold real estate in this State, in the same manner as if he was a citizen of the United States.

(4) The ninth section of an act entitled "An act to regulate the descent and distribution of intestates' estates," approved March 18th, 1848, is hereby repealed so far as the same may be inconsistent with this act, and this act

shall take effect and be in force from and after its passage. (Pas. Dig. Laws page 106.)

This statute introduced a new rule as to aliens, based as to non-resident aliens on reciprocal rights granted to our citizens, and as to resident aliens, based on a declared intention to become citizens.

It was an affirmative statute, including within its scope all aliens, whether resident or non-resident, and undertook to *define* their civil rights.

> Bryan *v.* Sundburg, 5 Tex., 423, citing Davies *v.* Fairbairn, 3 How, 636.

But the 4th section of said act, by its terms expressly repealed Sec. 9 of the Act of 1848, so far as it may be inconsistent with the act of 1854.

Mr. Justice Bonner in delivering the opinion of the Court in the case of The State *v.* I. & G. N. R. R. Co., reported in 57 Tex. says, beginning bottom of page 549.

"The authorities are numerous that constructive repeals, or repeals by implication are not favored, but even in such cases, it is the general rule that a subsequent statute, which as to a certain subject matter of a previous one, creates a new, entire and independent system, respecting this subject matter, will be held to repeal by implication, without express words to that effect, so much of the prior Statute as is inconsistent therewith. Sturman *v.* the State, 21 Tex., 736, and authorities cited.

But when, as in the present case, express words of repeal, so far as the two statutes are inconsistent, are contained in the subsequent statute. Then there is no room for construction, save as to the question of conflict, and in so far as the two statutes do materially conflict, the "latter must prevail."

If, then it be conceded that the effect of Sec. 9 of the act of 1848 was to confer on all aliens a right to inherit real estate in Texas, it seems to us that said Sec. 9 is inconsistent with the act of 1854, which limits the right to

certain classes of aliens, viz: To those whose laws accord reciprocal rights to our citizens and to those who reside in Texas intending to become citizens.

Both laws cannot stand when they lead to inconsistent results.

The facts in this case as shown by the bill of exceptions, are that Edward Hanrick died seized in 1865, intestate, without issue and unmarried, leaving as his next of kin a nephew, the defendant, E. G. Hanrick, a citizen and son of the intestate's deceased brother Philip. He left also surviving him two brothers, James and John Hanrick and one sister, Elizabeth O'Brien. These were all aliens residing in Ireland. subjects of the Queen of the United Kingdom and so continued.

(2) The plaintiffs claim by conveyance from Elizabeth O'Brien by deed made by her in May, 1878.

(3) In May, 1870, the British Parliament passed an act in effect removing the common law disability of alienage, but providing this law should not affect estates where descent was cast before the act was passed.

(4) Previous to the passing of said act the rule of the common law prevailed in said Kingdom and aliens could neither inherit or cast descent.

It is plain from the above statement that Elizabeth O'Brien could not inherit any portion of the estate of Edward Hanrick, deceased, in Texas, by virtue of any of the provisions of the act of 1854 above recited; and as we understand the plaintiffs, they concede this point. But they claim that Elizabeth inherited a defeasible estate under Sec. 9 of the act of 1848—that the act of 1854 was an affirmative and enlarging statute, conferring additional rights on aliens and not intended to deprive them of the rights they had under Sec. 9—and was dormant until the act of the British Parliament passed in

1870 gave it force and effect, and that then the joint effect of the two acts was to convert the defeasible estate into an absolute title.

This seems to be the drift of the opinion in Hanrick *v.* Hanrick, 54 Tex., on page 111.

But this view overlooks the words of the act, which declares that the act *shall take effect* and *be in force from* and *after its passage.*

Without doubt it became the law instantly—repealing clause and all. It was an act of sovereignty and did not depend for its validity or force upon the British Parliament.

The only question it seems to us is, can Elizabeth O'Brien claim a right to inherit under Sec. 9 of the act of 1848, which is denied to her by the act of 1854.

Under one law it is claimed that she is an heir and under the other it is conceded that she is not an heir.

There could be no greater inconsistency between an affirmative and negative of the same proposition.

The accomplished lawyers who revised the laws of Texas in 1879, have in Art. 1658 R. C. S., after copying section 9 in full, added as a proviso the following, viz :

Provided that the treaties of the United States with the nation to which such alien may belong, do not otherwise direct, *and provided further* that aliens may take and hold any property, real or personal in this State by devise or descent, from any alien or citizen, in the same manner in which citizens of the United States may take and hold real or personal estate, by devise or descent within the country of such aliens." The exact language of section 2 of the act of 1854. The language is may *take* and *hold* in the *same* manner.

The revisers certainly construed the rights of aliens to depend upon reciprocal rights extended to our citi-

zens. It is equivalent to saying to foreign governments, Texas will allow your citizens to take and hold as heirs in Texas, provided you will allow our citizens the same privileges in your country.

Laws and treaties providing for reciprocal rights between the citizens of different nations are not unusual.

In the case of Hamenstein *v.* Lynham, 10 Otto., 483, before cited, the alien plaintiffs recovered by virtue alone of the terms of a treaty between the Swiss confederation and the United States in force when the descent was cast, providing for reciprocal rights in favor of the citizens of the two nations.

In the case at bar the same right is provided for by statute, and with that difference *only* is on all fours with the case last cited and to which we respectfully invite attention.

It is claimed in behalf of the aliens that the statute of 1854 was construed in the case of Andrews *v.* Spear, 48 Tex., 567, and in the case of Airhart *v.* Messieu, 8 Otto., 491. It was referred to in those cases, but only to show the liberal policy of the State towards aliens; it was not construed. But it was construed in the case of White *v.* Sabriego, 23 Texas, just as we construe it. In that case the demurrer to the petition was sustained. It alleged the alienage of plaintiff and did not allege any facts constituting him an exception to the general rule that aliens could not sue in our courts. He did not bring himself under the provisions of the constitution of 1836, by alleging himself to be the heir of a citizen; nor did he bring himself under the requirements of the act of 1854, by alleging that citizens of the United States could inherit in his country. He therefore stood as at common law and could not maintain a suit in our courts. That is exactly the case here. Plaintiffs have brought themselves within the general rule by alleging their alienage, and

have not brought themselves within the exceptions. There never has been a law in Texas permitting aliens generally to take and hold real estate by devise or descent. Whenever the privilege has been extended at all it has been restricted to a certain specified class of aliens. And, as the general common and civil law rule is, that aliens cannot take and hold, or sue for, real estate, a party alleging his alienage must make such further allegations as will show him to be of the class of aliens that are permitted to take and hold real estate, or else he cannot maintain a suit for the same in our courts.

The language of the statute being, as we conceive so plain and peremptory, we would hardly feel justified in consuming so much time, but for two cases decided by the Supreme Court of Texas.

Hanrick *v.* Hanrick, 54 Tex., 101, and same case in 61, Tex. 506.

In that case the heirs of James Hanrick, now deceased, (brother of Elizabeth O'Brien), are prosecuting their claim in the State Court.

The Judge in the lower Court sustained a demurrer to their petition in accordance with the case of White *v.* Sabriego, 23 Tex., 243, and the plaintiffs appealed while said appeal was pending, the Court below ruled on the demurrer in this case—overruling it—and afterwards the Texas Supreme Court, at Tyler, Justice Bonner delivering the opinion, reversed the case on appeal, following substantially the ruling of the Circuit Court in this case.

It should be noted that Chief Justice Moore dissented (see Notice opposite page 1, 54 Tex.) and although the decision of a divided court in conclusion on the pending appeal, the opinion does not in Texas, bind the Court or the parties, accordingly when the case was again before the Supreme Court, the *same questions were*

considered and a like decision was made, but for very different reasons expressed in the opinion.

We do not urge that a line of decisions establishing a rule of property should not be followed, but will undertake to show that the two decisions referred to are contrary to the previous decisions on the same subject, and are unsupported by reason or authority, and are therefore not entitled to weight in the decision ot this case.

As to the opinion in 54 Tex., 101.

In that case for the purposes of the appeal, the parties made an agreed case.

The first proposition agreed upon was as follows, viz:

"Did a title to real estate in Texas descend and vest in the alien heirs of a citizen of the United States, who died in 1865, said heirs being unable to claim under any of the provisions of the Act of 1854, defining the civil rights of aliens." Page 106.

The Court in discussing the question quotes all of the statutes referring to aliens, and assumes that by virtue of Sec. 9, Act of 1848, *all* aliens could take a defeasible estate.

The Court then enquired whether or not this section is repealed by any of the provisions of the said act of 1854, and proceeded to hold on page 109:

"The statute of 1854 does not in express terms repeal Sec. 9, Act of 1848, for it is affirmatively provided that it is repealed so far as inconsistent with the Act of 1854, thus clearly evincing the legislative intent that the Act of 1854 would be the rule in certain cases."

The learned judge also holds in effect that the act of 1854 was not the law of this case until the British Act of 1870 was passed, when instantly it had the form and effect of law, and vested full title in plaintiffs. It is also held in the opinion that by virtue of Sec.

9, the son of James Hanrick, who in 1865 lived in the United States, could also inherit, the alien father being "considered *civilities mortuus*." Attention is invited to the opinion.

It is not only contradictory and repugnant in itself but it is so extraordinary in its statements and line of argument that it cannot be followed, and so ill-considered that no Court would take it as an authority on a single proposition it announces.

And in fact it was not followed when the case was again called in the District Court, that Court again sustained a demurrer, and a second appeal was prosecuted. Case reported in 61 Tex., 596.

An examination of that case will show that the Court paid no respect to the former opinion, and proceeded to consider the case as an original question. 61 Tex., 600. The judgment of the lower Court was again reversed, and case remanded to the lower Court, where it is still pending.

The basis of the opinion and the decisive point in it is found in first paragraph, top page 602, where referring to Sec. 9 of the act of 1848, regulating descents, this language is used :

"But it is here claimed that section 14, re-enacted in 1848, standing alone and unaided by any other enactments, is not sufficient to confer upon alien heirs the right to take real property by descent. It is a part of an act regulating descent and distribution, and when considered with reference to the context, it follows by necessary implication, or rather, construction, that aliens are embraced by intention in the terms 'kindred,' 'children,' 'descendants' 'heirs,' and other like expressions used throughout that act, and that the section under consideration is in the nature of a limitation upon the rights of aliens in this respect."

A great deal more is said in the opinion, but the

part above quoted comprehends and decides the entire question at issue, viz: Can aliens inherit real estate in Texas.

The English act known as the "Naturalization Act of 1870," can have no effect in this case, because not enacted until after descent was cast by the death of the alleged ancestor, in 1865. The act expressly provides that it shall not effect estates previously descended. See the case of Sharpe *v.* De St. Sanveur. 26, L. T. N. S., page 142—an English case discussing the application of that act in a similar case.

This proposition cannot be successfully controverted, viz:

If the principle announced in the opinion is correct any alien and all aliens, from whatever country or nation, can inherit under our general law of descent equally with citizens, and therefore whether a party claiming to be alien or citizen, need not be asked, or alleged, or denied, for the right to inherit is the same.

If this view be correct, if in fact the laws enacted previous to 1854, for the benefit of aliens, did not add to their *privileges*, but limited and *restricted* their *rights*, which they had under the general law of descents equally with citizens, the entire law on the subject of alienage has been but little understood in this country.

Hardy *v.* DeLeon, 5 Tex., 242.
Cryer *v.* Andrews, 11 Tex. / 7 /
Barclay *v.* Cameron, 254.

In White *v* Sabriego 23 Tex., 243, the plaintiff's petition alleged that they were aliens, but did not further allege any facts that brought them within the provisions of the 14th section of the Act of 1840, or of the 9th section of the act of 1848, or of the act of 1854. And the court held that the rights of the plaintiffs must be de-

termined by the rule of the common law. See also the case of McKinney *v.* Sabriego, 18 How., 238. Now if aliens were embraced in the terms "kindred, descendants" and such like words used in our Statute of descents, and could take under that law, but for the limitation on their rights contained in section 9, all of the cases cited are evidently wrong.

In the case of Crane *v.* Reed, 21 Mich., 24, also reported in 4 Am. 430. The court says on page 4:

"It is claimed that under the ordinance of 1787, the intention existed to do away, in the rules of inheritance, with all questions of alienage, and that the policy of the government has always been to put aliens on as good footing as citizens But we have not been able to trace any such intention in the action of the United States.

"There has always been a policy aimed at inducing aliens to become citizens, but none which would render it indifferent to them, whether they become citizens or not. On the contrary there are no courts in the country which have enforced the disabilities of aliens, who do not seek to become citizens more uniformly than the courts of the United States. And the laws and treaties speak the same language.

"The only color for claiming such a construction for the words of the ordinance, is because it does not say when declaring the rules of descent, that the relatives must be American citizens, and because it applies the same rules to the estate of 'resident and non-resident proprietors.' But there are probably very few statutes which undertake to mention specially the citizenship of those who are to be affected by them

"It is implied in all statutes that they shall be read in accordance with the recognized rules of interpretation, and to apply to such persons or things as fall naturally within their scope.

"It is not customary in passing acts to express such disabilities as should be implied. And alienage has been recognized in all common law, and in most, if not all other countries as a disqualification to hold land in fee."

The entire case is very interesting and we invite special attention to it.

In the case of Jackson *v.* Fitz Simmons, 10, Wend., 9. Reported also in 24 Am. Dec., page 198. The court say on page 201: "The true answer however, to all claims under the statute of descents, contrary to the rules of the common law, is that the statute was only intended to change the common law canons of descent. It is not an enabling statute to give capacity to persons to take by descent, in cases where, by the common law, they were incapable of inheriting by reason of alien or other disability."

See also Orr *v.* Hodgson 4, Wheat, 463.

The opinion holds that if the words "and in no other manner" or other equivalent expression had been added to the second section the intent to make the act the only rule would have been plain and unmistakable.—Page 604.

We hold that those words are implied. Bryan *v.* Sundberg, 5 Tex., 423. "Affirmatives in statutes that introduce a new rule imply a negative of all that is not within the purview." Same case and authorities cited.

The opinion holds that the legislature did intend to repeal some portion of Sec. 9, and that the repeal should be confined in its operation to the nine years restriction or limitation clause, page 605.

Say that the repeal applies to the "nine years restriction or limitation," then as persons embraced by intention in the terms "kindred, descendants, heirs" and other like words used throughout the Act of 1848, they would take and hold under said Act equally with citizens, and not affected by the limitation. This would be in effect to make the Act of 1854 abolish all disability of alienage, so far as the right to inherit or to cast descent is concerned.

Let us test the question.

Hanrick *v.* Hanrick, 54 Tex., 101, and same case, in 61 Tex., 596, have established a new rule of property, based on the construction of a State statute, and are therefore binding on the Federal Court.

That case is still pending and undetermined, and the Court may, on the final disposition of the case, discard their former opinions, and restore the old rule.

The Court in that case (in 61 Tex., page 600) in referring to the former opinion in 54 Tex., say:

"When a former decision in the same call has not "become a rule of property, *or* when the case was not "remanded with directions to the Court below to proceed "in some particular way. Our Supreme Court has re-"examined the ground of the former decision, and in "some instances has reversed the holding on the former "appeal."

Citing, Reaves *v.* Petty, 44 Tex., 252.

Again at the time that descent was cast in this case, and at the time that the Circuit Court made its ruling on this question, raised by the defendants demurrers, (see Bill of exceptions No. 1) the rule now contended for prevailed in Texas, nor had the case of Hanrick *v.* Hanrick, 54 Tex., 101, been decided.

Burgess *v.* Selighman, 107 U. S. Rep., page 33 and 34 and note. In this case, and in a long list of cases cited in the note, this Court refused to be bound by decisions of State Courts on same questions.

See also the opinion of this Court, in Carroll County *v.* Smith. 111 U. S. Rep., 563.

In that case the Court say: "The decision in Ham-"kins *v.* Carroll County above referred to, is not a judg-"ment of the Supreme Court of Mississippi, construing "the constitution and laws of the State which, without

"regard to our own opinion upon the question involved, "we feel bound to adopt and apply in the present case. "It is a decision upon the very bonds here in suit, pro- "nounced after the controversy arose, and between other "parties. It was not a rule previously established, so as "to have become recognized as settled law, and which of "course all parties to transactions afterwards entered "into would be presumed to know and to conform to"

2 As to proof of title out of plaintiffs by prior conveyances:

The deed made by Philip O'Brien and Eliza M. O'Brien, his wife, to John B. Sargent, (page 84 of the Record) conveys, an undivided one-half of all the interest derived from William Jenkins, Jr., by his deed of same date, with covenants that grantor is lawfully seized in fee simple and against incumbrances, and of good right to sell and convey, and of general warranty. This deed is dated Feb. 1, 1878, was duly acknowledged by the grantors and duly recorded.

The interest derived from William Jenkins, is the same that was conveyed to him by Philip O'Brien on same day by virtue of his power of attorney from James Hanrick, John Hanrick a d Elizabeth O'Brien (page 84 of the Record). The above mentioned deed to Jenkins will be found on page 82 of the Record, and is also dated Feb. 1, 1878, and is duly acknowledged and recorded.

The deed conveys "All the right, title and interest "which we or any of us have in, and to the following de- "scribed tracts of land situated in the State of Texas, "which belonged to Edward Hanrick, deceased, &c:

Specifies seven distinct tracts, including land in controversy, grantors covenant that they were lawfully seized of an interest in fee simple. That the same is free from incumbrances; that grantors have good right to sell and convey, and that they warrant and defend title, &c.

NINTH ASSIGNMENT.

In support of this assignment of error we call attention to the testimony recited under eighth assignment.

This testimony shows the acquisition by the defendant, E. G. Hanrick, of a superior outstanding title, covering 9,400 acres of the land in controversy, and the record presents the question, "Can the plaintiffs claim any interest in said 9,400 acres of land without contributing or offering to contribute some portion of the expenses?"

Freeman on Co-tenancy, §162 and §156.
Roberts *v.* Thorn, 25 Tex., 728.
Venable *v.* Beauchamp, 3 Dana, 321.

(Reported also 28 Am., Dec., 74 and notes, p. 83.)

TENTH ASSIGNMENT.

The deeds referred to in this assignment proved that the deceased intestate had conveyed before his death portions of the land sued for, and that as to such portions plaintiffs were not seized, as alleged. It was the duty of the jury to find what land the plaintiffs were entitled to recover. Revised Statutes provide:

Article 4808. Upon the finding of the jury or of the court where the case is tried by the court, in favor or the plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title or possession or both, as the case may be, of such premises *describing* them, and where he recovers the possession, that he have a writ of possession.

(See also article 4708.)

We understand this to be the rule at common law.

McArthur *v.* Porter, 6 Pet., 205.

Mr. Justice Story in that case says:

The real question, then, before the court is whether the plaintiff, upon proof of a title to a part of the premises sued for in the ejectment, is by law entitled to a general verdict for the whole of the premises sued for."

Quite a number of authorities are cited and discussed, and the learned judge says:

"These authorities and the American authorities cited at the bar are to the same effect—demonstrates that the plaintiff is entitled to recover only according to his title; and that if he shows title to a part only, he is entitled to have a verdict and judgment for that part and no more."

The justice of this rule is very apparent, where, as in this case, the judgment may become the basis for a claim for mense profits as well as for a partition of the property

ELEVENTH ASSIGNMENT.

The proof of adverse possession for ten years and more by the defendant, Hanrick, and his co-tenant, Gurley, was in support of his plea of limitation, (see page 14 Record,) and we submit was full and sufficient, at all events it was for the jury to pass on and to find from the evidence whether the possession was adverse, and continued for a sufficient length of time to constitute a bar. We therefore urge that it was error to withdraw the issue from the jury. Portis v Hall 3 Fy. 279

Alexander v Kennedy 19 Fy 488
Teal v Terrell 58 Fy 257

TWELFTH ASSIGNMENT.

This assignment complains of the construction of the deeds offered in evidence by the defendant, Hanrick, to show title out of plaintiff's, and by the intervenors to show title in them.

Much of what has been said in disscussing other assignments will apply here. And in addition it should be noted that the parties asserting the invalidity of said deeds, and the fraud and want of authority in Phillip

O'Brien to convey the estate of John and James Hanrick and Elizabeth O'Brien, is the same Phillip O'Brien, and those who are in privity with him, those who had the benefit of the fraud, or want of authority to make the deed to Jenkins, and those who now propose to take a second benefit by setting up that fraud and the further fraud, and want of authority in making deeds to Sargent and to Branch,

If a party may set up his own wrong and use it as a weapon of offence against his neighbor, then can O'Brien and wife and their accomplice Brady set up O'Brien's fraud for their joint benefit.

The question here is not whether John Hanrick, James Hanrick or Elizabeth O'Brien or those who have right to represent them might not by proper proceeding in a proper tribunal set those deeds aside, but the direct and only question is, can these plaintiffs have such right? Can they who are estopped by their own deeds made with full covenants of seizen, of right to convey and of general warranty, now deny the right they solemnly covenanted that they held and by their deeds had conveyed?

The charge of the court on this point could not have been stronger against the defendant if Elizabeth O'Brien, of Ireland, the alleged defrauded party, had been plaintiff in the case.

L. W. GOODRICH,

Of Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

E. G. HANRICK,
vs.
E. M. O'BRIEN, *et al.*
No. 256.

Brief of W. Hallett Phillips, of Counsel for Plaintiff in Error on the Question of Jurisdiction.

Suit was brought in the United States Circuit Court for the northern District of Texas by Philip O'Brien, his wife Eliza M. O'Brien and W. Brady, against E. G. Hanrick.

The petition alleged that in 1865 Edward Hanrick, an American citizen, died intestate seized of certain described tracts of land situated in Texas. That he left surviving him two brothers, John and James Hanrick, one sister, *Elizabeth* O'Brien, and a nephew, the defendant E. G. Hanrick.

John, a citizen of Great Britain, died intestate and without issue; James, a citizen of Great Britain, died intestate leaving issue, who are named in the petition, but are not parties. That administration upon the estate of Edward Hanrick was had, and the lands named had never been partitioned among the heirs or parties claiming under them. That under the laws of Great Britain aliens were entitled to take and hold real property.

That in 1878 the said *Eliza* O'Brien was seized of an undivided interest in the land described, and that at the time named, she conveyed all her right and title to the plaintiff. Eliza M. O'Brien.

That afterwards, Eliza M. conveyed one-half of her interest to W. Brady.

The petition then alleges that the plaintiffs being so seized and possessed of an undivided one-third interest, they were, in 1879, dispossessed by defendant, who denies the title of the plaintiffs.

It concludes as follows:

> "The premises considered plaintiffs pray that the defendant be cited as the law directs to answer this petition, and that on final hearing they have judgment against said defendant, decreeing and vesting in them or either of them, an undivided interest in said tract of land described in said "Exhibit A," and that a writ of possession issue for same, and costs of suit and all other relief both general and special, and plaintiff will ever pray." (p. 3.)

By their 4th amended petition, some changes are made in the allegations, not material now to be mentioned, and the plaintiffs pray:

> "That the defendant be cited to answer this petition, and that on final hearing plaintiffs have judgment against defendant and recover of said defendant an undivided one-third interest in and to said lands, and that a writ of possession issue to them therefor, and that they recover their costs and all other relief, both general and special, to which, in the opinion of your Honors, they may be entitled to; and plaintiffs will ever pray." (p. 13.)

The defendant filed a demurrer and also an answer setting forth his defenses to the action and claiming a two-thirds interest in the property sued for, as the sole heir of

Edward Hanrick, the other one-third interest, being the property of his co-tenant Gurley. The demurrer among other grounds was founded on the alienage of Elizabeth O'Brien through whom plaintiffs claimed. The general issue was also pleaded. (p. 13—15.) The demurrer was overruled, and to the ruling of the Court the defendant excepted, and a bill of exceptions was approved October 9th, 1880. (p. 49.)

On April 4, 1883, the record recites, "the original answer of Wharton Branch, an intervenor, was filed."

It avers that Elizabeth O'Brien and James and John Hanrick, on May 16, 1870, executed and delivered to Philip O'Brien, one of the plaintiffs, their power of attorney, whereby they authorized him to sell and convey their interests in the land in controversy. That on February 14, 1878, in consideration of legal services and money advanced, the said Philip O'Brien acting for himself, his wife Eliza M. O'Brien, and Elizabeth O'Brien, and James and John Hanrick, sold and conveyed to Branch one undivided one-fourth of three-fourths of the estate, by deed duly executed and delivered.

That at the time of making such deed, the said Philip O'Brien agreed to cure all defects in his power of attorney or the title conveyed by him, if any defects existed, and in pursuance of such agreement obtained conveyances from all the parties in interest to be made, the said Philip taking the same in the name of his wife, Eliza M. O'Brien, and that the title so conveyed enured directly to the benefit of the vendee of Philip.

The prayer is for judgment against all parties to the suit, establishing intervenor's right, title and interest in the estate, and that he have the same set apart to him in severalty and for full and general relief. (p. 21.)

On the same day J. B. Sargent also filed "an original answer," claiming an interest in the land by virtue of a deed

from Philip O'Brien, executed on the same day as that of Sargent, and by virtue of the same power of attorney. He claimed an undivided interest of one-half. The prayer is "that he have judgment establishing his right to the share of the lands described, and that he have a judgment and decree against all parties for partition, and that he have the interest adjudged to him, set apart, and allotted to him in severalty, and for general relief." (p. 22.)

The plaintiffs filed objections to these petitions, stating among other grounds, that the consideration for the deeds to Branch and Sargent had failed, and that in fact no consideration had ever passed; that a suit was then pending in the District Court for Galveston County, Texas, for the cancellation of the deeds; that plaintiffs had an equitable defense against the claims arising out of the conveyances; and to permit Branch and Sargent to assert by virtue of their conveyances an interest in this suit, would result in great injury to plaintiffs by depriving them of their equitable defense; that plaintiffs could not sue out an injunction against Branch and Sargent setting up the conveyances in this suit, without causing great delay. They therefore ask that leave to intervene be denied and the petitions struck out.

These objections were filed April 4, 1883. On the next day plaintiffs filed their "first supplemental petition." (p. 24.)

This is in substance a bill for cancellation of the deeds of Branch and Sargent.

The "petition" is divided into thirty-three sections and extends from page 24 to page 37 of the Record. It assails the deeds as obtained through false representations and fraud and because the "considerations for which they were executed were unauthorized by the terms of the power of attorney." (p. 25.)

The facts alleged to constitute the fraud and misrepresentations are set forth at length. It is moreover alleged that the instruments were delivered in escrow and that the recording of them was in violation of the agreement between the parties; that at the time of the institution of this suit the plaintiffs had no reason to believe that any claim would be set up under the deeds. "That neither Branch or Sargent had in any manner indicated an intention of fulfilling their agreements in consideration of which the instruments were signed, nor had Branch evinced any disposition to violate the trust reposed in him as the custodian of said instruments by recording the same, or by using or permitting any use of the same, inconsistent with their characters as escrows, or in such a manner as to cast a cloud upon the title of plaintiff."

The petition concludes:

> "The premises considered plaintiffs pray that they have and recover of the said Wharton Branch and John B. Sargent, as well as the said Edward G. Hanrick, an undivided one-third interest in said lands described in said Exhibit A, and for all other relief both general and special. (p. 37.)

The defendant Hanrick moved the Court to dismiss the cause, on the ground that plaintiffs' rights, if any, were only cognizable in a court of equity. (p. 52.)

The cause coming on for trial before a jury, a verdict was rendered:

> "We, the jury, find for the plaintiffs."

Upon which verdict the Court rendered the following judgment:

> "It is therefore ordered and adjudged by the Court that the plaintiffs, Eliza M. O'Brien and Philip O'Brien

and Wm. Brady, have and recover of the defendant, Edward B. Hanrick, and of the intervenors, Wharton Branch and John B. Sargent, one undivided one-third interest in and to the following described lands. * *

"And it is further ordered that a writ of possession in favor of said plaintiffs issue therefor; and that plaintiffs do have and recover of such intervenors such costs by them incurred, by reason of such intervention and of defendant all costs which were incurred herein, not including any costs incurred by the said intervention, for which let execution respectively issue." (p. 49.)

From this judgment the defendant Hanrick prosecuted a writ of error and gave bond. (p. 98.)

The first question which arises is whether the court is without jurisdiction to review the judgment, by reason of the fact that the two intervenors, Branch and Sargent, were not joined in the writ of error, nor was there any formal summons and severance as to them.

It is claimed that the judgment was a joint one against Hanrick the defendant, and the intervenors, Sargent and Branch, and that the non joinder of the two latter is fatal to the writ af error.

The defendants in error have waited for the expiration of the two years limitation before making the motion to dismiss.

Subsequent to the suing out of the writ of error by the defendant below, Branch and Sargent prosecuted their separate writ of error, and their case is now pending on the docket as No——.

It is submitted that it was competent for the defendant Hanrick to prosecute his separate writ, without regard to the intervenors.

Whatever may be the form of the judgment, in substance, it is an adjudication that the plaintiff was entitled to recover

severally from the defendant Hanrick, and from the intervenors Branch and Sargent, one-third interest in the land claimed by each of them. Hanrick the sole defendant, not only did not claim through the same title as the intervenors, but claimed adversely to them. As against Hanrick, the suit of the plaintiffs was one to recover possession of a portion of the land, to the whole of which it was asserted, Hanrick claimed title, and he alone was alleged to be in possession.

On the other hand, the title of the intervenors was derived from the same source as that of the *plaintiffs*—to wit, through Elizabeth O'Brien. The conveyance to the intervenors was for the express purpose of compensating them for their prosecution of the claim of Elizabeth O'Brien, to recover from Hanrick the one third of the property now sued for and held by him as the only heir of Edward Hanrick, of heritable blood.

The deeds to the intervenors were made by Philip O'Brien in virtue of the power of attorney of Elizabeth O'Brien, given prior to the alleged conveyance by Elizabeth O'Brien of her interest in the property to plaintiff E. M. O'Brien.

In their petition of intervention, Branch and Sargent asserted title, not only against the plaintiffs, but against Hanrick.

As against the intervenors, the plaintiffs' claim was to have the deeds held by them declared void.

Neither the titles, the possession, nor the defenses of the intervenors and the defendant were joint. Hanrick, the sole defendant, was entitled to defend the suit irrespective of their claims, before judgment, and was equally entitled to test the validity of that judgment, by writ of error.

Cox & Dick vs. *United States*, 6 Pet., 172.

His rights in this respect cannot be affected by the Texas practice, nor by a failure to recognize the well-established dis-

tinctions between forms of actions and remedies at law and in equity.

The judgment as to Hanrick and the intervenors is severable. It might be entirely right as to the one, and erroneous as to the others. Hanrick has a distinct and separate claim to the property adverse to the titles held by all the other parties.

The plaintiffs could proceed and enforce the judgment as to the intervenors without affecting the question of their right to recover against Hanrick. The action was against Hanrick as the party in possession, and the interventions were for the purpose of establishing the titles of the intervenors to certain portions of the land against both Hanrick and the plaintiffs, and for the recovery of possession.

Under these facts, we submit that it is plain the motion should not be granted.

In legal effect the judgment, as it stands, is against the defendant Hanrick and the intervenors—for the land which they respectively claimed.

Ex. Parte French, 100 U. S., 1.

Suppose the question was as to the amount in controversy, and the defendant had joined the intervenors in his writ. If it should be shown that his interest in the property was below the jurisdictional value, could he establish jurisdiction by joining the value of the interest claimed by the intervenors? Surely not. And yet if, as contended, the judgment was joint, this could be done, for then the sum in dispute would be the value of the combined interests.

It would be strange that Hanrick should have joined Sargent and Branch in his writ of error, as his title depended upon his defeating that under which they claimed.

There was neither community of interest nor community of title.

The following are the principal cases relied on to support the motion.

Williams vs. *Bank, U. S.*, 11 Wh., 414. That was a joint action against three defendants for money loaned, and there was a joint judgment against the three, but the writ of error was sued out in the name of one defendant.

Owings vs. *Kincannon*, 7 P., 319. A suit in Equity was brought by the complainant to have his title to land established as superior to that asserted by the defendants, all of whom claimed the land under and by virtue of an entry subsequent to that of complainant. There was a decree in favor of complainant, some of the defendants did not join in the appeal, and it was dismissed on the ground that all the parties who were united in interest ought to have united in the appeal.

Masterdon vs. *Herndon*, 10 Wall., 416. A bill of peace was brought against several defendants and there was a decree in favor of the complainant quieting his title and removing the clouds cast thereon by the defendants. Only one of the defendants was named in the appeal.

The main object of the bill was to prevent a multiplicity of suits, and the defendants were jointly interested in defeating the relief asked. In such a suit no affirmative relief is accorded affirmatively to the individual defendants. The sole question is whether the bill is sustainable. The decree against the defendants bound them jointly.

Hampton vs. *Rouse*, 13 Wall., 187. The defendants claimed under one and the same title, and the defense was joint as was the judgment.

Simpson vs. *Greeley*, 20 Wall., 152. The action of ejectment was brought against nine defendants, eight of whom were tenants of Simpson, the remaining defendant. They

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 256.

E. G. HANRICK, *Plaintiff in Error,*

vs.

ELIZA M. O'BRIEN *et al.*, *Defendants in Error.*

ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS AT WACO.

Brief of Defendants in Error.

I.

The general statement of the nature and result of this suit, set out in the brief of plaintiff in error on pages 1–6 is, in the main, correct.

We will consider each of plaintiff in error's assignments of error, in the order in which the same are discussed in his brief, beginning with the second, pages 10–14 of the same.

II.

Discussion of second assignment of error pages 10–14 plaintiff in error's brief.

Statement.

This assignment reads:

> (2.) "The court erred in striking out the defendant's plea in abatement for want of proper parties." (See page 7, plaintiff in error's brief.)

In addition to what is shown in plaintiff in error's statement of the contents of the plea in abatement (pages 10, 11 of his brief), the plea, after naming numerous persons alleged to be in adverse possession of portions of the land, goes on and states "besides many others too numerous to mention, and in another place "besides a great number of others too numerous to mention," and in another place, "said several parties are numerous, viz: more than five hundred." (Record, p. 51.)

1st. As to the alleged necessity of making other persons than the defendant, E. G. Hanrick, alleged in said plea to be in adverse possession of portion of the land in controversy, parties to this suit.

REMARKS.

The court will bear in mind that this plea in abatement does not define by metes and bounds the extent of E. G. Hanrick's claim of title, and for this reason alone nothing said in his brief, pages 12, 13, on this point is applicable to the issue presented.*

Again, the plea in abatement was filed too late.

The bill of exceptions does not show that the plea was filed in the due order of pleadings as required by article 1262 R. S., 1879, Laws of Texas, which read as follows: "The defendant in his answer may plead as many several matters, whether of fact or of law, as he shall think necessary

*The plea in abatement was fatally defective since it did not furnish plaintiffs below with all the material necessary to enable them to avoid the same alleged defect in another suit, or by amendment. The plea does not attempt to set out the names of all the parties alleged to be in adverse possession of the land. 1 Chit., Pl., 445. Neither does the plea negative the fact, but that said parties held amicably with and not adversely to the plaintiffs below, or that they claimed as against plaintiffs any right in the undivided interest sued for.

* * * *provided* that he shall file them all at the same time and in the due order of pleadings." This plea was filed April 3, 1883, after the suit had been pending since Feb. 13, 1880, more than three years. While the defendant, E. G. Handrick, filed general and special demurrers and a general denial April 6, 1880, nearly three years before. (Record pp. 5, 6.)

Again, the action of trespass to try title in Texas is not strictly an action of ejectment. It is what its name indicates, simply an action to test title. It can be brought against a claimant out of possession as in possession. In *Titus* vs *Johnson*, 50 Texas, page 238, the court says; "That he may elect to consider himself ousted and bring suit against an adverse claimant of the land, even though such claimant has never been in actual possession of it, is equally well settled."

~~*Stewart* vs. *Kemp*, 54 Tex., 248, it was held that the defendant had no cause to complain of failure to join others in possession with himself of the land in controversy.~~

The plea contains no reference to the disclaimer of title as to portions of the land described in plaintiff's petition, filed by defendant below. It does not attempt to set out the metes and bounds of the tracts alleged to be held adversely by other parties. No judgment was sought to be recovered as to them.

No reason founded in principle or authority can be given for holding them to be necessary or even proper parties.

See appendix B for further discussion of this plea in abatement

2d. The heirs of James Hanrick, holding the remaining undivided one-third interest, were not necessary parties.

AUTHORITIES.

On death of ancestor his real estate descends and vests in his heirs, and they hold it as tenants in common.

---

* The question as to the necessity of the joinder of additional parties defendant, is a matter of policy and convenience. Minor vs. Black, 1 Pet., 79. The plea in abatement admits not only the inconvenience of requiring the joinder of these parties, but shows the impossibility of so doing since it alleged that they number more than five hundred, besides many others too numerous to be mentioned.

In Waring vs. Crow, 11 Cal., 366, it was held in an action for ejectment to recover an undivided interest in a mining claim, that it was not necessary to make parties defendant in such action who were in possession of such claim holding other undivided interests. The Court says: "In order to a full investigation of the merits of the controversy, it was only necessary to sue the party who interfered with plaintiff's property or did him wrong. The object of the plaintiff in this suit was not a partition of the common property, but to settle the right of the plaintiff as against an adverse claimant to his share and proportion." *Id.*

At common law, tenants in common could not join in ejectment. (Freeman on Co-tenancy and Partition, §§ 341, 342, 331; and in *Poole* vs. *Fluger*, 11 Pet., 185, some doubt was expressed as to whether tenants in common could join in ejectment.)

In *Alexander* vs. *Gillian*, 39 Tex., 236, where the other heirs were not joined the court says:

> "Admitting that he, (the plaintiff) was only a tenant in common, having succeeded to Henry's share with the other children and heirs of Henry Austin, Sr., he might maintain the action of trespass to try title." (See also *Craft* vs. *Rains*, 10 Tex., 519; *Grassmeyer* vs. *Bisom*, 18 Tex., 767; *Walrus* vs. *McGrew*, 16 Tex., 511; *Riley* vs. *Jameson*, 14 Amr. Dec., 324.

In *Hanrick* vs. *Hanrick*, 63 Tex., 622, these same heirs of James Hanrick brought suit against this same defendant below, E. G. Hanrick, without joining their co-heirs, and recovered judgment, which was affirmed by the supreme court.

See also *Pilcher* vs. *Kirk*, 55 Tex., 208.

Stovall vs. *Carmichael*, 52 Tex., 390.

Waring vs. Crow, 11 Cal., 366.

III.

Discussion of the third assignment of error, see pages 14–24 plaintiff in error's brief.

Statement.

The bill of exceptions on which this assignment of error is predicated shows the refusal of the court below to sustain plaintiff in error's motion to dismiss "this cause, because it appears from the pleadings of plaintiffs that this court has no jurisdiction to hear and determine the matters in contro-

versy, and that plaintiff's right, if any they have, is a matter cognizable only in a court of equity." Record, p. 52, 53.)

As the decision on this writ of error, will, in our opinion, turn on this assignment, we will here first make an epitomized statement of the facts and issues involved in it.

The petition of plaintiffs below, on which they went to trial, showed that one Edward Hanrick died in 1865, seized of the land in controversy. His heirs consisted of two brothers, James and John Hanrick, a sister, Elizabeth, otherwise Eliza O'Brien, and a nephew, E. G. Hanrick, who was the defendant below. John Hanrick died in 1871, intestate, unmarried and without issue, and James Hanrick died intestate in 1875, leaving children who were not made parties to the suit, so that thus a third interest in the land was owned by Elizabeth O'Brien, another third by the heirs of James Hanrick, and the other third by the defendant below, E. G. Hanrick.

In April, 1878, said Elizabeth O'Brien conveyed her interest to Eliza M. O'Brien, one of the plaintiffs below, and wife of the plaintiff Philip O'Brien, she "being then the daughter-in-law" of the said Elizabeth O'Brien, and "said conveyance having been made for her separate use and benefit." (Record, p. 12.) In November of the same year the said Eliza M., joined by her husband, Philip, conveyed half of her interest to her co-plaintiff William Brady. The prayer was for a judgment against E. G. Hanrick for an undivided one-third interest in the lands in controversy.

On the day before the trial began, Wharton Branch and John B. Sargent intervened, claiming to be the owners of the interest in the lands which plaintiffs below were seeking to establish. (See page 4 of defendant in error's motion to dismiss, herein filed, for extracts from the statutes of Texas authorizing such ~~cause~~ on intervenor's part.)

Branch and Sargent by their pleadings claimed to be the owners of the interest sued for on these grounds, viz:

In 1870 said Elizabeth O'Brien and John and James Hanrick, being, as before stated, respectively the sister and brothers of Edward Hanrick, deceased, executed and delivered to said Philip O'Brien, husband of said Eliza M. O'Brien, a power of attorney authorizing him in usual terms to sue for and sell their interest in the lands in controversy. That by virtue of the power of attorney, said Philip O'Brien in Feb., 1878, conveyed the land in controversy to intervenors; hence they claimed title to it under deeds prior in date to the deeds from Elizabeth O'Brien, under which the plaintiffs claimed. (R., p. 20, 21.)

Thereupon the plaintiffs below filed a supplemental petition, in which they set out this power of attorney in full, as well as the conveyances to Branch and Sargent under the same. By this supplemental petition defendants in error sought to avoid the force of these deeds to Branch and Sargent, on the ground that the same were void, for three reasons, viz.:

1st. Because the execution of the deeds, for the considerations for which they were in fact executed, were unauthorized by the power of attorney.

2d. Because the same were but escrows, and their delivery was procured by fraud.

3d. Because the execution of the same was procured by fraud.

Our Counter Proposition

under this assignment of error is, that even if the allegations in the supplemental petition were insufficient to avoid the deeds to Branch and Sargent in a court of law, and that these deeds must be held valid in a court of law, nevertheless there still remained a fractional legal interest in the plaintiffs, which, in any event, they were entitled to recover

on the trial below, and hence the court did not err in refusing to dismiss said cause

Statement.

The supplemental petition alleged that in the early part of the year 1878 "it was thereupon agreed by and between the said Philip O'Brien, John B. Sargent, and one William Jenkins, that the three following described conveyances should be executed: *First*, that the said Elizabeth O'Brien, of Ireland, by her agent, the said Philip, should convey to the said Jenkins all her interest in said estate and land in Texas. *Second*, that said Jenkins should then immediately convey to the said Eliza M. O'Brien, wife of said Philip, all the interest in said estate and lands acquired by him, the said Jenkins, by virtue of the conveyances referred to next above. *Third*, that said Eliza M. O'Brien should then convey to defendant, Sargent, one-half of the undivided interest in said lands acquired by her by virtue of said conveyances referred to next above. It was also then and there agreed by said parties that the first and second of said conveyances should be without good or valuable consideration, and the consideration of the last-named of the same, to wit: said conveyance to Sargent, should be an agreement on the part of said Sargent to furnish all the money necessary for establishing, by legal proceedings, the interest of said Eliza M. O'Brien in and to said land, and also to furnish board and lodging for said Philip and wife during the pendency of said litigation without reimbursement till the same should be settled." It was alleged that such deeds were in fact executed in pursuance of this agreement (Record, p. 26, 27), on Feb. 1, 1878.

Counsel for plaintiff in error is mistaken in stating in his brief (page 17) that the deeds above referred to purported to convey "all of said land." Each of them were

but quit-claim deeds, purporting simply to convey such interest, or fractional part of an interest, as the grantors had in the lands. (Record, page 37, and pages 26, 27.) We make

The Point Here

That the pleadings show that no legal title whatever was vested in Sargent by these conveyances to and under Jenkins. The power of attorney did not authorize the conveyance to Jenkins for trust purposes, much less did it authorize the conveyance to Sargent in consideration in part of boarding the agent Philip and his wife. (See copy of power of attorney, Record, p. 42.)

AUTHORITIES.

Dufont vs. Westherman, 10 Cal., 354.

Morrill vs. *Kane*, 22 How., 81; *Phelps* vs. *Harris*, 11 Otto. 376: *Mechanics' Bank* vs. *Bank*, 5 Wheat., 337.

Holton vs. Smith, 7 N. H., 446.

For a further discussion of extent of the agent's authority under this power of attorney, see Appendix A.

Further Statement under this Counter-Proposition.

The pleadings next show that in pursuance of the agreement, on Sargent's part, to furnish all the money necessary to carry on said legal proceedings, Sargent and Philip O'Brien visit Galveston. Here, "said Branch informed them that said apparent conveyance from said Elizabeth O'Brien, of Ireland, by her agent Philip, to Jenkins, was void, for the reason that the same was unauthorized by the terms of said power of attorney." (Record, p. 27.) That on the 14th day of February, 1878, in consideration of an agreement on the part of Branch and Sargent to procure and furnish money for the prosecution of said legal pro-

ceedings, and to provide board for Philip and wife pending the same, the deeds described in Exhibits X and Y (pages 39 and 40, Record), were signed by Philip O'Brien (Record, p. 3). At the time of the signing of these deeds, as shown by the pleadings (R., 12) John and James Hanrick were dead, and of course the power was revoked as to them. The power of attorney did not authorize the agent to convey any particular tract of land, or any particular interest in the same, but simply such interest as the principals might have in the lands pertaining to the estate of Edward Hanrick, deceased (Record, p. 42). At the time of the execution of these deeds, Elizabeth O'Brien's interest was an undivided one-third interest. The

Point Here

Is that this deed to Branch, taken in connection with the power of attorney, could not be construed, under any circumstances, to convey more than one-fourth of Elizabeth's one-third interest, and the deed of Sargent, executed on the same day (Feb. 14, 1878), could not be construed to convey more than one-half of her third interest. This deed reads "one undivided one-half interest of, in, and to all the property of the estate of Edward Hanrick, deceased. situated in the State of Texas, to which we are in any way entitled." This would leave in Elizabeth O'Brien ($\frac{1}{4}$ of $\frac{1}{3}$ = 1-12; $\frac{1}{4}$ of $\frac{1}{3}$ = $\frac{1}{6}$; 1-12 plus 1-6 = 3-12 = $\frac{1}{4}$; $\frac{1}{3}$ — $\frac{1}{4}$ = 1-12) at least an undivided one-twelfth interest.

amounting to about 6,000 acres for which this suit at law can be maintained even if the deeds to Branch and Sargent could not be questioned in a Court of law.

The petition also alleges that the execution of these deeds constituted one and the same transaction. (Rec. p. 30.)

It thus appears that there necessarily remained in Elizabeth O'Brien, of Ireland, a small undivided interest, after

the execution of the deeds to Branch and Sargent, under the power of attorney, whether these deeds were void or not And this interest she could convey to whomsoever she pleased.

The pleadings of plaintiff below did not show that Eliza M. O'Brien, wife of Phillip O'Brien was

Estopped

by any covenants of warranty :

1st. Because it was not shown by the pleadings that she ever personally executed such a deed as would thus estop her. In her deed to Sargent of date February 1st, 1878, referred to by plaintiff in error on page 21 of his brief, she simply conveys "one undivided half of all my right, title, and interest in and to the following described land." (Record p. 84.)

2d. Because she, Eliza M. O'Brien could not authorize her husband by power of attorney to convey her interest in lands, much less to bind her by covenants of seizure.

Clark vs. *Mumford*, 62 *Texas*, 531.

3d. Because it is alleged in the pleadings that the property was conveyed to Eliza M. O'Brien for her *separate use and benefit* (Record p. 12.) See *post* page.

4th. Because it is impossible to ascertain from the instrument the extent of the interest which O'Brien intended personally to warrant, and a warranty is not binding unless extent of interest warranted is clearly evident. *Van Renseselær* vs. *Kearney*, 11 How., 325; Legal title does not pass by estoppel, unless conveyance is of a precise or definite legal interest. *Gilmer* vs. *Poindexter*, 10 How., 257.

5th. Because doctrine of estoppel can have no application in this case, because pleading show that Branch and Sargent

were aware of the death of James and John Hanrick at time deeds were executed, and of the fact that land was in adverse occupancy. (Record, p. 32, Sec. 19.)

"Where the condition of title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel." *Brant* vs. *Virginia Coal Co.*, 93 U. S., 326.

6th. Because no consideration was ever given by either Branch or Sargent on which to base an estoppel, and because of their fraudulent practices in obtaining said deeds. (Rec., p. 33, Sec's. 21, 22, 23, 24 and page 35, Sec. 28.

Again, the allegations show beyond possibility of dispute that the deed to Sargent, at least, of date February 14, 1878, was

An Escrow.

The supplemental petition recites that Philip O'Brien agreed to sign this deed and the one to Wharton Branch, provided the same should not take effect as deeds, or be recorded or otherwise used as such until said Branch and Sargent had instituted, in good faith, said legal proceedings. That Branch then proposed to Philip that he should sign and acknowledge them, and place them in his, Branch's hands, with the understanding that "they should not be recorded or take effect as deeds, or be in any way used as such until the said Sargeant should remit him, Branch, money enough to institute all necessary suits, etc., etc." That this was agreed to by Sargent. The petition reads "and so the said Philip did * * * sign and acknowledge said instruments and place them in Branch's hands for the purposes aforesaid on said representations; nor was said instrument in favor of Sargeant, referred to next above,

ever delivered by the said Philip to Sargent, nor did he, the said Philip, ever authorize any one to deliver the same to Sargeant or to place the same on record (Record p. 31). It is further recited that both Branch and Sargeant failed to institute or cause to be instituted said legal proceedings, or to take any steps whatsoever for the purpose of establishing the title. That Sargent failed and refused to advance said money, etc., etc. (Record, p. 35, 36), where the facts recited negatived any authority on the part of Branch ever to have delivered the deed to Sargent.

Authorities.

That a deed is but an escrow, may be established by parol evidence.

That in case of an escrow no legal title passes till deed is delivered.

That unauthorized delivery does not pass the title. *Calhoun Co.* vs. *Emigrant Co.*, 93 U. S., 124. Well established that plaintiff is entitled to recover a less interest than that sued for. *Williams and Guyon* vs. *Davis*, *56 Tex.*, *250*, and authorities there referred to. *Hatchings* vs. *Bacon*, 46 Tex., 414. **Stark vs. Barrett, 15 Cal., 363.**

Since this, the third assignment of error is defeated by showing that plaintiffs below did in fact have an undivided legal interest in the land in controversy, however small such interest was, and that hence it was not error to refuse to dismiss their case, we do not think it necessary to discuss the merits of the three grounds (supra, p.) on which plaintiffs below sought to avoid in toto the effect of the

deeds to Branch and Sargent; out of an abundance of caution, however, we present a full discussion of the subject in appendix A hereto annexed. The grounds which we maintained in the court below on these points being that the deeds were void. *First*, because the execution of the deeds in consideration in part of boarding the agent and his wife was a fraud upon the principal, and unauthorized by the terms of the power of attorney, as well the execution of the same in consideration of legal services to be rendered and costs to be incurred, being unauthorized by the terms of the power of attorney; *Second*, because the deeds were but escrows, and the delivery of the same was procured by fraud; and *Third*, because the execution of the deeds were procured by fraud.

IV.

Discussion of fourth assignment of error, page 24 plaintiff in error's brief.

Statement.

This assignment calls in question the action of the court in overruling the exceptions filed by the defendant below to plaintiff's said supplemental petition. (Record, p. 53.)

There are seven exceptions in the bill, and we will consider them *seriatim*.

"1st. The said plea shows no right in plaintiffs to have the relief prayed for."

REMARKS.

No relief was prayed for in the supplemental petition, other than a judgment against the defendant, E. G. Hanrick, and the intervenors, Branch and Sargent, for a third interest in the land described in plaintiff's petition.

"2d. The plaintiffs in said plea claim by a new and different right from that set up in their original petition." (R., 53.)

REMARKS.

Plaintiffs below, in their original petition, claimed a third interest in the land in controversy under a deed from Elizabeth O'Brien, dated on the —— day of ———, 1878. (R., p. 2.) They claimed under the same deed in the amended and supplemental petition. (R., p. 12.)

"3rd. Said plea shows that plaintiff did not have, when this suit was brought, any legal title to the premises sued for." (R., 53.)

REMARKS.

As shown in the discussion of the third assignment of error, a legal title to at least a portion of the interest inherited by Elizabeth O'Brien was shown by the pleadings of plaintiffs below.

"4th. Said plea attempts to join an equitable action to cancel deeds outstanding in Sargent and Branch, with an action at law for the possession of land brought against this defendant." (R., 53.)

REMARKS.

Nothing is said in the pleadings of plaintiffs below relative to the cancellation of any deeds, nor is any relief of an equitable nature prayed for.

"5th. The said plea in no manner connects this defendant with the charges of fraud and failure of consideration alleged in said plea against Sargent and Branch." (R.. 53.)

REMARKS.

Nonsense. Plaintiffs below, in their pleadings, did not attempt to avoid the effect of the deeds to Branch and Sargent on the ground of failure of consideration, or fraud relative to the consideration, or on any equitable grounds.

"6th. The alleged equitable right set up in said plea is a State demand." (R., 53.)

REMARKS.

Sheer nonsense.

V.

Discussion of fifth assignment of error, (page 24 Pl't'ff in Error's Brief.)

Statement.

This assignment of error reads as follows:

"The Court erred in admitting in evidence the deed purporting to have been executed by Eliza O'Brien, of Ireland, to Eliza M. O'Brien, one of the plaintiffs:

"1st. Because the said deed, so far as the same was propounded as the deed of Elizabeth O'Brien, had been impeached as a forgery by the affidavit of Wharton Branch, a party to the record.

"2d. Because said deed did not purport to be the deed of Elizabeth O'Brien, nor did the same purport to vest title in Eliza M. O'Brien to hold as her separate property.

"3d. Because of the unexplained erasures and changes appearing on the face of said deed."

First Counter Proposition.

No error is shown in admitting the deed over the affidavit of forgery: 1st. Because the bill of exceptions does not show that the affidavit was filed three days before the trial began. On the contrary the bill shows that the affidavit was made on the 4th day of April, 1883 (Record p. 62), and that the deed was offered in evidence on the 6th day of April, 1883. (Record p. 56.) The judgment bears date April, 6, 1883. (Record p. 47.)

REMARKS.

The Supreme Court of Texas, in construing Art. 2257, set out in plaintiffs in error's brief, expressly hold that the affidavit of forgery must be made three days before the trial begins. *Hammond* vs. *Connolly*, 63 Tex., 62. For a full discussion of this point, should the Court care to look into it further, see Appendix B.

Second Counter Proposition.

The Court did not err in admitting in evidence the deed for the purpose of proving the allegation in our petition that Elizabeth O'Brien, the sister of Edward Hanrick, deceased, conveyed her interest to Eliza M. O'Brien.

REMARKS.

The deed recites that she, the said Eliza O'Brien, is the sister of Edward Hanrick, deceased. (R., 57, middle of page.)

If the person who is thus described in said instrument actually signed her name to it, and executed the same, it is immaterial whether she signed her name in full or how she spelled it. The certificate of acknowledgment and proof of the subscribing witness, Martin O'Brien, name her as the person described in the deed. (R., p. 59.) It was competent for the Court to admit the deed in evidence and permit us to establish the identity of the party by parol evidence. This the Court, in fact, did, and submitted this issue to the jury in his charge. (Bottom of page, R., p. 97.) Difference in names "Amelia" for "Permelia." *Ganier* vs. *Cotton*, 49 Tex., 118; "Sophia" when name was "Mary," *Cordia* vs. *Cage*, 44 Tex., 535.

Neither did the Court err in admitting the deed, because of our allegation that the conveyance was made for the separate use and benefit of Eliza M. O'Brien.

STATEMENT.

The deed is in favor of Eliza M. O'Brien, wife of Philip O'Brien, and recites, but a consideration of one dollar, and purports to convey the interest inherited by the grantor as a sister of Edward Hanrich, in over 160,000 acres of land. (Record p. 57.)

The petition alleges that the property was conveyed to Eliza M. O'Brien for her separate use and benefit, she being the daughter-in-law of the said Elizabeth O'Brien. (R., 12.)

AUTHORITIES.

If deed is taken in name of wife, it will be presumed to be for her separate use and benefit. *Smith* vs. *Strahan*, 16

Tex., 314; *Story* vs. *Marshall*, 24 Tex., 385; *Dunham* vs. *Chatham*, 21 Tex., 232; *Higgins* vs. *Johnson*, 20 Tex., 389.

Parol evidence always admissible in such cases to show real intention. *Baker* vs. *Baker*, 55 Tex., 577.

Third Counter Proposition.

The Court did not err in admitting the deed on account of the unexplained erasures because the alterations were immaterial.

REMARKS.

The effect of the deed would have been the same whether the name had been originally written "Elizabeth" or "Eliza" in the deed. The erasures being immaterial and not shown to have been fraudulent will be presumed to have been made at the time of the trial of the execution of the deed, with the consent of the grantor.

AUTHORITIES.

That immaterial alterations will not vitiate deed. 1 Green on Evidence, 564, note. **Abbott's Trial Ev., p. 696.**

Whether alterations are material, or not question of law for Court. *Steel* vs. *Spencer*, 1 Pet., 552.

Again, since by Texas practice Art. 2,257, set out in plaintiff's brief page 25, deed is admissible unless impeached by affidavit of forgery in the absence of such affidavit, the deed is admissible even though alterations are material, so expressly held in *Fitch* vs. *Boyer*, 51 Tex., 347. This is the established rule: 1 Greenleaf on Evidence, 564, note; *Walton* vs. *Start*, 5 Gilm., 252.

VI.

Discussion of sixth assignment of error, pages 7 and 26 Plaintiff in Error's brief.

Counter Proposition.

It is the established rule in Texas that, except as to innocent purchasers and creditors, parol evidence is admissible for the purpose of showing that the consideration of a deed to a wife was love and affection, and that deed was one of gift. See *Supra.* page 17

VII.

Discussion of seventh assignment of error, pages 8 and 28 Plaintiff in Error's brief.

First Counter Proposition.

The Court did not err in refusing to give the charge requested, because, on these points, at least, the charge requested contained a gross misstatement of the law, viz:

The charge contained this clause: "Or if you are not satisfied from the evidence that said erasures were made at or before the time said deed was executed, then you will find a verdict for the defendants." (R. p. 63.)

The second charge, page 63, Record, is also erroneous. *First.* Because, as shown by the authorities referred to, *supra* the deed from Eliza M. O'Brien to Eliza O'Brien, was not *prima facie* a deed to community. *Second.* Because the title, in no event, passed by estoppel to Branch and Sargent for reason shown on *ante* pages of the bill not showing what evidence was introduced in support of our allegations on that point. *Third.* Because this charge is but an abstract statement of what is claimed to be a legal proposition, and contains no directions showing what the jury should do in case the proof did fail to satisfy them, etc.

AUTHORITIES.

"When instructions are asked in the aggregate, and there is anything exceptional in either of them, Court may reject all. *R. R.* vs. *Horst*, 93 U. S., 291; *Worthington* vs. *Mason*, 101 U. S., 149; *U. S.* vs. *Hough*, 103 U. S., 71.

Again the exception was taken in mass to the action of the Court in refusing these series of charges, some of which were unquestionably incorrect.

AUTHORITIES.

When the exception is to a series of propositions in the mass, it must be overruled if any proposition be sound. *Johnson* vs. *Jones*, 1 Black, 209; *Rogers* vs. *Marshall*, 1 Wall., 644; *Harvey* vs. *Tyler*, 2 Id., 828; *Lincoln* vs. *Claflin*, 7 Id., 132; *Beaver* vs. *Taylor*, 93 U. S., 46; *Moulor* vs. *Ins. Co.*, 111 U. S, 335.

Second Counter Proposition.

The Bill of Exceptions shows that the Court did in fact submit the issue to the jury as to whether the person who signed her name to the deed as Eliza O'Brien, was the person described in the petition as Elizabeth O'Brien, the sister of Edward Hanrick, deceased.

Statement.

The bill contains this language:

"But the Court refused * * * to submit any of said issues to the jury, except only the question as to whether the said Elizabeth O'Brien and the said Eliza O'Brien, are one and the same person." (Record, p. 64.)

Third Counter Proposition.

There was no evidence before the jury authorizing the Court to submit the issue of forgery.

Statement.

The record does not show that any evidence was introduced to the jury on the question of forgery, except the affidavit of forgery filed by Wharton Branch. There was evidence addressed to the Court on the subject preliminary to the introduction of the deed, but none whatever to the jury. (See R. p. 62.)

AUTHORITIES.

It has been expressly held in Texas, that filing affidavit of forgery is insufficent to raise issue of forgery before the jury. *Cox* vs. *Cock*, 59 Tex., 521.

VIII.

Discussion of the eighth Assignment of Error, pages 7 and 28, Plaintiff in Error's brief.

First Counter Proposition.

This assignment of error cannot be considered by the Court, because it is too indefinite. It does not show how or why the Court below erred in refusing to instruct the jury to find for the defendants.

AUTHORITIES.

Ground for asking court to instruct to find for defendant must be stated below. Kline vs. Russell, 19 Wall, 462; Beaver vs. Taylor, 3 Otto, 54; Wilson vs. McNamee, 12 Otto, 572, Norris vs. Jackson, 9 Wall, 127.

It is possible that the defect in this assignment of error is cured by the statement on page 33 of Plaintiffs in Error's brief, to the effect that the testimony sustains two grounds on which the Court should have directed a verdict for the defendants.

We will therefore discuss these two grounds.

Second Counter Proposition.

The alienage of Elizabeth O'Brien, when descent was cast, was not a bar to plaintiff's right of action. (See Plaintiff in Error's brief, p. 33).

REMARKS.

Since the institution of this suit, the Supreme Court of the State of Texas, in three cases, has expressly decided this question in our favor. We do not deem it necessary to waste the time of the Court in discussing it further. But see Appendix C for an argument on the subject.

AUTHORITIES.

Hanrick vs. *Hanrick*, 54 Tex., 101;
Hanrick vs. *Hanrick*, 61 Tex., 60;
Hanrick vs. *Hanrick*, 63 Tex., 622,

"Decisions of State Courts on the construction of their own constitutions and statutes, if settled by the highest court, will be followed in these courts.

Luther vs. *Borden*, 7 How., 1;
Nesmith vs. *Seldon*, 7 Id., 812;
Webster vs. *Cooper*, 14 How., 488;
Gilpeke vs. *Dubuque*, 1 Wall., 175;
Randall vs. *Brigham*, 7 Wall., 523;
Township vs. *Marcy*, 92 U. S., 289.
Township vs. *Perkins*, 94 U. S., 260;
Fairfield vs. *Gallatin County*, 100 U. S., 47;
Post vs. *Supervisors*, 105 U. S., 667.

Third Counter-Proposition.

Under no circumstances does the proof show that the plaintiffs below did not have at least a small fractional legal title, to the extent of which, in any event, they were entitled to recover. (See Plaintiff in Error's brief, p. 51.)

REMARKS.

We have already fully presented this subject in our discussion of the third assignment of error, *ante* page 4.

In view of what is their show, particularly in regard to the deed from O'Brien to Sargent, of date Feb. 14, 1878, being an escrow (see *ante* page 11); in view of the fact that "evidence was before the jury tending to sustain the allegations in plaintiff's supplemental petition" (Rec., p. 32), it would manifestly have been improper to have charged the jury to find for the defendants. Such fractional undivided interest as plaintiffs below showed themselves then seized of, they were entitled to recover, no matter how small.

The simple question as to whether the allegations in our supplemental petition, in support of all of which evidence was introduced, were sufficient to avoid the force of the deeds to Branch and Sargent in whole, is not raised by a single bill of exception, but out of abundance of caution we discuss it fully in Appendix A.

IX.

Discussion of the Ninth Assignment of Error, pp. 8–54, Plaintiff in Error's Brief.

Counter-Proposition.

The court did not err in withdrawing from the jury the claim of title set up under the deed from Geo. E. Lane, because the defendant below was estopped from setting it up.

STATEMENT.

Defendant, E. G. Hanrick, for the purpose of showing an adverse title to a portion of the land in controversy in himself, introduced the deed, or more properly speaking the release for Geo. E. Lane to E. G. Hanrick, dated Feb. 1st, 1877, reciting the fact that he, Lane, had acquired all the title of Chambers' estate to that portion of the Ataracio de La Serda grant in conflict with the Chambers' grant, "and not before the date of my said deed conveyed by Chambers in his lifetime, or by his administratrix since his death, estimated to contain about 12,000 acres; and whereas E. G. Hanrick claims to own said land under the said La Serda title, and in *compromise and full settlement of the pending litigation* has conveyed to me 2,800 acres of said 12,000 acres by his deed of this date." (R., 76.)

"Now, therefore, in *consideration* of the *said conveyance and the facts hereinbefore stated*, I, Geo. E. Lane, have granted, bargained, sold and conveyed by way of quit-claim, and by these presents do grant, bargain, sell and forever quit-claim unto the said E. G. Hanrick, all that part of the before mentioned tract of about 12,000 acres, save and except

the said tract of 2,800 acres * * * * to have and to hold all and singular said premises unto him, said E. G. Hanrick, his heirs and assigns forever." (R., 76.)

The bill shows (R., 96) that in 1860, Edward Hanrick, deceased, instituted suit in the United States Circuit Court at Austin against the said T. J. Chambers and others, to recover that portion of the La Serda grant in conflict with the T. J. Chambers grant, including the land referred to in the release from Lane to E. G. Hanrick. That in January, 1867, the death of Edward Hanrick, deceased, was suggested and the suit was revived in the name of E. G. Hanrick as "sole heir and administrator." That in 1874, judgment was rendered in favor of the defendants from which judgment E. G. Hanrick, administrator, as aforesaid, ~~presented~~ a writ of error to the Supreme Court of the United States, where it was dismissed on Oct. 12, 1877, for failure on the part of plaintiff in error in that cause, E. G. Hanrick, to prosecute the same.

It also appears that E. G. Hanrick was in possession of the property at the time of the dismissal of the writ of error, and at the time of the execution of the release from Lane, and was administrator of the estate of said Edward Hanrick deceased. It will be observed that the writ of error was dismissed Oct. 12, 1877 (R., 96), eight months after Feb. 1, 1877, the date of the execution of the release from Lane to Hanrick.

It thus appears simply that E. G. Hanrick, while administrator of the estate of Edward Hanrick, deceased, the common ancestor, and while suit was pending against Chambers' estate, made a compromise with Lane, the owner at that time of the Chambers' title, and permitted the suit to be dismissed, he (E. G. Hanrick) being then in possession of the land in controversy.

Argument.

That E. S. Hanrick, under these circumstances, was estopped from setting up this release is too clear for argument, so it seems to us.

The consideration of the deed, or release rather, from Lane to E. G. Hanrick, as recited in the deed itself, was a compromise. The facts in evidence with it show that it was simply an agreement to abandon the writ of error which E. G. Hanrick, as administrator, was prosecuting for the estate of Edward Hanrick deceased. Eliza O'Brien one of the heirs of Edward Hanrick, by acquiescing in that abandonment, contributed as much to the consideration of that deed as E. G. Hanrick did.

~~For a full discussion of this subject, however, see appendix D, hereto attached.~~

X.

Discussion of the tenth assignment of error, page 9 and 54, Plaintiff in Error's brief.

First Counter Proposition.

If there was error in withdrawing said deed from the jury, the same has been cured by the remittitur, filed in this Court on the day of , 1886, in these words:

E. G. HANRICK, *Plaintiff in Error*
vs.
ELIZA M. O'BRIEN *et al.*, *Defendants in Error.*

Comes W. H. Patrick, administrator of the estate of Eliza M. O'Brien, deceased, and William Brady and Philip O'Brien, by their attorneys of record Brady & Ring, and in favor of the plaintiff in error and Wharton Branch and John B. Sargent, remit so much of their judgment rendered in this cause in the court below on the 6th day of April, 1883, as gives them an interest in the land described in said deed from Edward Hanrick to Falls County, Texas, of date Sept. 1, 1854; and also in the land described in said deed for Edward Hanrick to B. G. Sheilds of date Sept. 4, 1854, in and moves the Court reform said judgment by adding to the same, after the words "which said tract of land was granted to Mathew R. Williams as attorney for said Antanacia de la Serdo, on the day of , A. D. 1833" the following words, to wit: "From the tract of land" next above described, however, shall be deducted the two following described tracts, viz.: (here follows the description of the tracts of land described in said deeds).

Authorities authorizing such remittiturs to be made in Supreme Court, *Bank of Kentucky* vs. *Ashley*, 2 Pet., 327; *Hughes* vs. *Union Ins., Co.*, 8 W., 294;

Miller vs. Scott, 9 Otto, 26.

Second Counter Proposition.

The Plaintiff in Error did not properly except to the action of the court below in withdrawing these deeds.

STATEMENT.

The only thing in this bill which by any possibility could be construed to bear upon the action of the court below in this particular, is the following:

"To which ruling of the Court in withdrawing the said issues from the jury * * * defendant * * * excepted." (R., p. 98; also, see R. p. 97.)

No charge on this point was asked by plaintiff in error

We submit that this language was not sufficiently definite to inform the court below of the defendant's intention to except the action of the Court in this respect. No issue was made in reference to this matter.

Third Counter Proposition.

Plaintiff in Error cannot now take advantage of this oversight on the part of the court below because, 1st, the attention of the court below to it was not called by requesting a proper charge on the subject; and, 2d, because the oversight was not called to the attention of the court below in a motion for a new trial.

Authorities.

Wilson vs. Warnell, 12 Otto, 574; Springer vs. U. S., 12 Otto, 586, Clark vs. Frederick, 15 Otto, 4. Exception taken not considered unless called to attention of court below in motion for new trial, Danks vs. Rodeheaver, 26 W. Va., 90, and authorities there referred to.

XI.

Discussion of the Eleventh Assignment of error, pages 9 and 55, Plaintiff in Error's brief.

Counter Proposition.

The bill of exceptions does not show that the plaintiff in error had held possession of any portion of the land in con-

troversy for ten years preceding the institution of this suit, and subsequent to the 30th day of March, 1870.

Nor does the bill of exceptions show when the suit was instituted; nor was any charge on the question of limitations asked by the plaintiff in error.

STATEMENT.

The only evidence introduced on the subject of limitations is shown on page 96. Record. The Texas constitution of 1869 suspended the Statute of Limitations until from 1861 to March 30, 1870.

The constitution reads:

"The statutes of limitati ons of civil suits were suspended by the so-called act of secession of the 28th of January, 1861, and shall be considered as suspended within this State until the acceptance of this constitution by the United States Congress." Const., of Tex., Art., 12, sec., 43. Approved by Congress March 30, 1870. 2 P. D. L's., of Tex., 1127.

This suit was filed February 13th, 1880, (R page 1, Transcript R page 5) which shows it was commenced within ten years subsequent to the 30th of March 1870, therefore the Court did not err in withdrawing the issue of limitations from the jury. Besides, E. G. Hanrick, plaintiff in error, was administrator of the estate of Edward Hanrick, deceased, and continued to act as such in prosecuting a suit in this Court until the 12th day of October, 1877, which precluded any statue of limitation from running in his favor. See R page 96 and 97—Transcript R, page 255, 256 and 257.

[illegible] assignment of error, pages 9 and 55.

J. T. BRADY,
H. F. RING,
Of Counsel for Defendant in Error.

APPENDIX A.

[Referred to on Pages 13 and 24, *ante*.

INTRODUCTION.

The outstanding titles in Wharton Branch and John B. Sargent constituted the principal defense set up by the plaintiff in error in the court below, except the defense of alienage, which was subsequently settled by the Supreme Court of Texas. While, as stated by us in our brief, pages 12, 13 and 24, *ante*, we are satisfied, since in any event there remained in the plaintiffs' below at least a fractional legal interest, that no bill of exceptions taken below raises the question as to the sufficiency of the pleadings and proof to avoid *in toto* the effect of the deeds to Branch and Sargent; yet, out of an abundance of caution, we propose in this appendix to discuss the matter as thoroughly as though this Court were to pass upon it in rendering its decision.

The record shows that evidence was introduced tending to sustain the allegations in the supplemental petition (R. page 97). The evidence itself is not set out, neither is the charge of the court shown on any of the issues raised by the supplemental petition; hence, it will, of course, be assumed that all the allegations in the supplemental petition were proven, and that the charges of the court in reference to them were correct, and the only thing to be considered is: Does the supplemental petition state facts sufficient in a court of law to avoid the effect of the conveyance to Wharton Branch and John B. Sargent, as well as the conveyance to Wm. Jenkins?

The supplemental petition shows:

First.—That at the time of the execution of the deeds, a confidential relationship existed between the parties. Branch as the pretended successor of Wm. G. Hale deceased, the life long friend and legal adviser of Edward Hanrick deceased, as one who had been employed by the deceased ancestor, Edward, to bring suits against adverse claimants of portions of the land in controversy (R. 3), asserted and claimed the existence of such relationship. (Sec. 3, p. 25, R.)

Second.—That the signing of the deeds and the delivery of the same to Branch was procured by fraudulent misrepresentations.

Third.—That no consideration was ever paid; no services were ever rendered; none of the promises made were ever fulfilled. All this in pursuance of a fraudulent intent—"a deliberate plan and intent on their part, at the time of the execution of said deeds, not to comply with their said promises." (R., Sec. 29, p. 35.)

Argument.

It is true that ordinarily, fraud, which is not connected with the signing of the instrument, cannot be shown in a court of law, the reason for the rule being, as stated by Mr. Justice Nelson in Hartshorn vs. Day, 19 How., 223, "The difficulties are in adjusting the rights and equities of the parties in a court of law."

There are many instances, however, in which deeds have been held void in a court of law on account of fraudulent representations made in procuring the execution of the same, and we believe this to be the correct principle by which the apparently conflicting rules announced by the courts can be harmonized, viz: Whenever the execution of an instrument raises an equity in favor of the grantee or any one else, which must be recognized and adjusted before a court can properly set the same aside, then such instrument cannot be shown in a court of law to be void for fraud.

We believe in every instance in which evidence offered in a court of law to show that the execution of an instrument was procured by fraud has been excluded, it will be found that a consideration of some character had been passed, which must be returned or adjusted.

If no consideration has passed; if there are no equities to adjust, why compel an appeal to a court of equity?

In *Jackson vs. King*, reported in 15 Am. Dec., on page 359, Mr. Justice Woodworth says: "Courts of law have also a concurrent jurisdiction with courts of equity, where the fraud can be clearly established, and will relieve by making void the instrument," referring to Bright vs. Egmon, 1 Burr., 396; 1 Fonbl., 661. Further on he says: "The distinction between legal and equitable jurisdiction upon fraud is this: That at law it must be proved, not presumed, so that equitable jurisdiction may be exercised upon an instrument unduly obtained when a court of law could not entertain the question," referring to 18 Ves., 483; *Butcher vs. Butcher*, 1 Ves. and B., 98.

In *Winn vs. Patterson*, 9 Pet., 663, opinion by Mr. Justice Story, no question was made but what it was proper to show in an action of ejectment that the grant was void, because of false representations made to officer issuing it; and in *The Amistad*, 15 Pet., on page 163, the court say: "Fraud will vitiate any, even the most solemn transactions, and an asserted title to property founded upon it is utterly void."

In *Swaze vs. Burk*, 12 Pet., 25, referred to *ante*, although the land was regularly sold at administrator's sale, bid in by the judgment creditor, and three years later conveyed by him to the administrator, the court held that ejectment was the proper remedy for the heir. In this case the fraud upon the heir being so gross that there were no equities to be adjusted.

In the case at bar, not only was the fraud practiced of the grossest character, not only was no consideration paid; but the vendees had absolutely refused to comply with their agreements, and abandoned the contract before Elizabeth O'Brien, of Ireland, executed the conveyance to her daughter-in-law, Eliza M. O'Brien, on the 11th day of May, 1878 (R., p. 53, sec. 20; p. 35, sec. 29).

It would seem, indeed, a great hardship if under all these circumstances Elizabeth O'Brien, on said 11th day of May, 1878, could not dispose of her interest in this estate without first instituting a proceeding in equity to cancel these deeds to Branch and Sargent, deeds which were in fact absolutely void. Of course, the right to bring such an action could not be assigned to her vendee, Mr. Justice.

Marshall in Russell vs. Clarke, Ex. 7, Chrach. 69, says: "On the question of fraud, the remedy at law is also complete, and no case is recollected where a court of equity has afforded relief for an injury sustained by the fraud of a person who is no party to a contract induced by that fraud."

It seems to us that every principle founded in reason and authority will sanction this simple rule for determining the question as to whether the action is necessarily equitable or not, viz: If there are equities to be adjusted, the deed is voidable and not void, and a bill in equity is the only remedy; if there are no equities to be adjusted, the deed is void, and the fact of its being void, if susceptible of being fully proven, may be shown in a court of law.

In McCall vs. Carpenter, 19 How., 301, when heirs of McCall brought ejectment, and defendant claimed under deed from McCall, held that evidence showing that deed was obtained by fraud, and showing the aged and decrepit condition of McCall at the time, and that the consideration was never paid, was admissible in a court of law. So in Randolf vs. Porter, 7 Watts, p. 387, the agent purchased land indirectly from himself, and it was held that ejectment was the proper remedy.

II.

As to the execution of the deeds for the consideration promised being unauthorized by the terms of the power of attorney.

Statement.

Briefly stated, the consideration of these instruments was an agreement on the part of Branch and Sargent to institute and carry on, at their own expense, all legal proceedings necessary for the establishment of the principal, Elizabeth O'Brien's rights, in her remaining interest in the estate; and an agreement also to board, or provide board and lodgings for the agent Philip and his wife during the anticipated litigation. No money was paid or promised, and nothing was ever done in pursuance of this agreement, nor was any claim ever set up by Branch and Sargent to any interest in the lands under this contract until years after its execution. The deeds in question not even being recorded until August, 1881, *after* the Supreme Court of Texas had decided that aliens could take by descent (Record, p. 37, sec. 33).

The deed to Sargent purported to vest in him one-half of the interest of the principal, and the deed to Branch, one-fourth of the same, leaving in the principal, Elizabeth O'Brien, but one-fourth of the interest inherited by her (see R., p. 29-42, Exhibit X., Y. and Z).

Argument.

FIRST.—If the conveyances were unauthorized by the terms of the power of the attorney, no title passed, either legal or equitable.

Authorities.

Morris vs. Cane, 22 How.
Phelps vs. Harris, 10 Otts., 376.
Mechanics' Bank vs. Bank, 5 Wheaton, 337.
Batty vs. Carwell, 2 John, 48.
Allen vs. Ogden, 1 Wash. C. C., 174.

SECOND.—The conveyances were unauthorized by the terms of the power of attorney.

Statement.

The power of attorney (R., p. 42, Exhibit Z), authorized the agent to do the following acts:

First.—In the names of his principals he could ask, demand and sue for their distributive share of the estate and execute receipts for the same.

Second.—In their names he could enter upon and take and retain possession of their shares for their use and benefit.

Third.—He was authorized "to sell, let or absolutely dispose of our distributive share of and in the same."

Fourth.—He was authorized "to *join* and *concur* in the letting, sale or disposition of the same messuages or tenements, lands hereditaments or other real or chattel estate, with their appurtenances, at such *time* or *times*, and in such manner as he shall think proper and expedient."

Fifth.—"To do all such acts and to take such proceedings, and use such lawful ways and means as he shall deem necessary to assert and establish our rights to all and any part of such lands, real or chattel estate."

Sixth.—To execute all necessary deeds, with or without covenants of warranty.

Seventh.—To receive and receipt for purchase money and rents.

Eighth.—To settle and adjust accounts.

Ninth.—To institute or defend suits at law or in equity, to confess judgment, suffer default and compromise the same.

Tenth.—To do all other acts "necessary in or about the premises."

Eleventh.—To substitute any one to act in his place.

Authorities and Argument.

The conveyances were executed in consideration in part of an agreement to board the agent and his wife pending the anticipated litigation. Authority to sell does not authorize agent to sell in payment of his own debts (Holton vs. Smith, 7 N. H., 446); or to transfer by way of security for his own private debts (Story on Agency, section 78); held that general power to mortgage will not sustain mortgage for benefit of third party (Greenward vs. Sprong, 54 Barb, 7), also held that authority to sell and convey does not authorize transfer to third party for purpose of enabling him to control and protect the property.

In executing the conveyances to Sargent and Branch, the agent, in effect, made a contract with them, by the terms of which they received a portion of the subject matter of the power on the considerations before stated. The power of attorney nowhere, in express terms, authorizes O'Brien to dispose of his principals' interests in such a contract, or to make any kind of a contract of this sort. Neither is he anywhere expressly authorized to dispose of his principals' interest in such manner as he may deem expedient, even if words to this effect would justify a disposition of the lands on such terms.

We call the attention of the court in this connection to the third and fourth division of the power of attorney. The third reads, "or to sell, let or ABSOLUTELY DISPOSE of our distributive share of and in the same." This is immediately followed by the fourth, in the words, "or to JOIN and CONCUR in the letting, sale or DISPOSITION of the same, * * * * * at such time or times, and in such manner, as he shall think proper and expedient." Defendant's counsel, in argument below, contended that the words, "in such manner as he shall think proper and expedient," qualified the preceding clause, the third division. But we respectfully submit that these words are limited to a qualification of the latter clause only, which is distinctly separated from the former clause. That is to say, the agent was authorized only to join and concur in the letting, sale or disposition of the property "at such time or times, and in such manner, as he shall think proper and expedient." It

will be remembered that the principals were entitled to an undivided interest only of three-fourths, hence, in anticipation of occasions when it would be expedient to join with the holder of the other fourth in the sale, letting or disposition of the property, the agent was thus expressly authorized so to do, and the clause here authorizing him to use his discretion clearly limits its use to the manner of joining in the sales and leases and to the "time" and "terms" of the leases. That this is a fair and natural construction of the language used seems patent; that a "strict construction" would thus limit it does not seem to admit of a doubt.

But "even if a general discretion is vested in the agent, it is not deemed to be unlimited, but it must be exercised in a reasonable manner, and cannot be resorted to in order to justify acts which the principal could not be presumed to intend."—Story on Agency, section 83. Can it be fairly presumed, from the language used, that the principals intended to invest O'Brien with authority to give away three-fourths of their interest in the estate, or any portion of it, in consideration of Branch and Sargent paying lawyers' fees and cost of court and boarding O'Brien and wife?

The power of attorney in question no more than authorizes the disposition of property in the usual course of business; nor does the use of the word "dispose" in this connection show that the principals contemplated vesting O'Brien with unlimited discretion in regard to the manner of disposing of it. Thus, in Clark vs. Courtney, 5 Peters, 345, the court says: "It purports to authorize Casey L. Clark 'to sell, DISPOSE OF, contract and bargain for all or so much of said tract of land, etc., and to such person or persons, and at such time or times, as he shall think proper, and in our, or the one of our names, to enter into, acknowledge and execute all such deeds, contracts and bargains for the sale of the same as he shall think proper,' etc. The language here used is precisely that which would be used in cases of intended sales or contracts of sale of the land, for a valuable consideration, to third parties in the ordinary course of business." Why will not this comment of the learned judge apply with equal force in our case? In the above case the agent "DISPOSED" of the land by conveying it back to the State in settlement of a tax claim, which disposition

was held void, the court saying: "The letter of attorney manifestly contemplated the ordinary contracts of bargain and sale between private persons for a valuable consideration." And so in our case the agent "disposed" of the land for something not contemplated in the terms of the power of attorney.

As illustrating the careful construction applied to these instruments, and the force to be given to the expression "dispose of," we invite the attention of the court to the case of Phelps vs. Harris, 11 Otto, 378.

The question was, as to whether a power conferred by will, authorizing a trustee "to sell and dispose of" lands and "invest the proceeds as he thought best," authorized him to partition the same. And in this connection we ask the court to call to mind the fact that powers are much more liberally construed than powers of attorney. On this point Story says, in note 2, section 67, Story on Agency: "The authority conferred by written instruments of agency of this sort is to be carefully distinguished from a class of cases closely resembling them—that is, powers of appointment created by deeds on last wills. In this class of cases courts of equity have indulged themselves in a very liberal interpretation of the words, and have held many executions of such powers valid, which would perhaps scarcely be allowed in the construction of letters of attorney.

In the case last referred to Mr. Justice Bradley reviews the decisions on this point, showing that from the earliest times until very recently it was considered doubtful whether the words "to sell and exchange," in a power even, authorized the trustee to partition. He says the "trustee, by the codicil of the will had full power to dispose of all or any portion of the property devised in the will that might fall to them, and invest the proceeds in such manner as he might think proper for their benefit. The expression 'TO DISPOSE OF' is very broad, and signifies more than TO SELL. SELLING IS BUT one mode of disposing of property. * * * *In re* Frith and Osborne, already cited, the terms of the power were 'to sell, dispose of, convey and assign the tenements, or any part thereof, by way of absolute sale for such a price in money, or by way of exchange for such equivalent in lands, as to the trustees

should seem reasonable.' The master of the rolls, in analyzing the phraseology, said: 'Of course the word SELL refers to SALE, and the word EXCHANGE refers to DISPOSE OF, and, therefore, it comes to this—whether a trust, including a power to dispose of by way of exchange for an equivalent in other lands, authorizes trustees to dispose of the undivided moity which they are empowered to dispose of for another undivided moity.'" It was held in the affirmative. In the discussion by Justice Bradley he argues that since the trustee was authorized to "sell and dispose of and invest the proceeds as he might deem most advantageous," and since "proceeds" is also a word of great generality and being associated with "dispose," and leaving the mode of disposition to the discretion of the trustee (by the express words of the instrument), that under all these circumstances an exchange of the lands or partition was permissible. We respectfully submit that if so much doubt existed in regard to the right of a trustee to partition lands under a POWER authorizing him to sell and dispose of them and invest the proceeds as he might deem most advantageous, that the same court would have no hesitation in saying that such an unusual and extraordinary disposition of the property as O'Brien attempted was unauthorized, particularly in view of the fact that in the former case the disposition was under a power to a trustee, while in the latter case it is by a mere letter of attorney—the former being subject to a liberal construction and the latter to a strict construction.

We are willing to admit that the expression "to dispose of," as used in the power of attorney to Philip O'Brien, may mean something more than to sell. Property may be disposed of by compromises, releases, etc., as well as by sale. (Story says, in 5 Pet., 347, that a release is not a sale.) The agent, O'Brien, was expressly authorized, in the ninth division of the power, to comprise suits, confess judgment, or suffer judgment by default, etc., by any of which means he could effectually dispose of the property otherwise than by sale.

And so, as was similarly said *In re* Frith, referred to by Mr Justice Bradley, in regard to the words "sell" and "exchange," we say, here in our case, that the words "dispose of" refer to a disposition by "compromises, releases," etc.—such disposition as would

naturally arise in the usual course of business under the power in clearing up titles—such as is thus, in fact, named in express terms. But, to go further than this, and to apply it as authorizing a way of disposing of the property in no manner indicated by the language of the power, is to at once invest the agent with unlimited discretion, a discretion which we submit is not authorized by usage nor by a single expression in the instrument.

It may be contended that a considerable discretion is given to O'Brien from the reading of the fifth division of the power, where the agent is authorized "to DO all such ACTS and TAKE such PROCEEDINGS and USE all such lawful WAYS and MEANS as he shall deem necessary to ASSERT and ESTABLISH our RIGHT to all and any part of such lands, real or chattel estate."

Again we say that a natural construction of this language—and much more so, a strict construction of it—will limit the authority conferred by it to the INSTITUTION and TAKING of such auxiliary PROCEEDINGS as injunction, attachment, etc.,to the DOING of "SUCH ACTS" and "USE" of such "LAWFUL WAYS AND MEANS" as the holding of possession by superior force when in possession, if necessary, or the forcible prevention of trespass when lawful or expedient, or the placing of agents and guards in possession, publishing notices, etc., for all these things are naturally suggested by the language used, and conduce to the object and end which the principals may be fairly presumed to have intended, and which they actually say they did intend, to-wit: "to assert and establish our right to any and all parts of such lands, chattels," etc.

Again, Story says: "When in general mandates some things are specially expressed, the generality is not extended to cases of greater importances than those expressed." Hence, if an examination of the power shows that it is very full and complete, and specially authorizes the doing of many acts of far less importance than giving away a portion of the subject matter itself in consideration of paying costs of litigation and furnishing board to the agent and wife; if matters of far less importance than these are specially named and provided for, can it be "fairly presumed" that the principals intended to confer such authority upon their agent, when, had such been their intention, they could have hardly

omitted saying so? O'Brien is authorized to "adjust and settle and commute accounts," to compromise suits, confess judgment, to lease and to collect rents, etc., all of which acts are of less importance than making contracts with Branch and Sargent of the nature described.

To be sure the power of attorney authorized O'Brien to institute suits and it naturally followed that he had authority to employ attorneys, for this is a "subordinate act" "necessary to carry the authority into effect." But it by no means naturally follows that he had authority to employ attorneys for anything else than money, much less that he authorized to give them a contingent fee in the subject matter in controversy. It was held, under a power of attorney" to take all necessary means to secure the right and title of the grantor to certain real estate, and to employ lawyers, gather testimony and PROVIDE THE NECESSARY EXPENSES," that the agent could not convey half the property to a lawyer in consideration of his paying costs of court and rendering legal services, though the consideration was not objectionable for champerty.—Blum vs. Robertson, 24 Cal., 127. And so an agent employed to manage a cause and employ counsel for a land company had no authority to pay counsel in lands.—Bernine vs. McLain, 1 Hoff. Ch., N. Y., 421. "Authority to buy does not authorize agent to buy on a credit. * * * If agent is authorized BY PAROLE to buy or sell, he may buy or sell on credit, IF this is the usual custom, but only on reasonable time, in accordance with the usual custom." * * * Story on Agency, sections 77, 78. But where the authority is conferred by an instrument in writing, the "nature and extent of the authority given by it must be ascertained from the instrument itself, and cannot be enlarged by parole evidence of usage." Reese vs. Medlock, 27 Texas, 123. In the above case, where the power of attorney authorized agent "to sell, TRANSFER and convey all lands * * * in the State of Texas," and "to do and perform all acts and deeds for me and in my name concerning any and all property that I may own in said State," it was held that a sale of land could only be made for money, and that a sale or exchange of the land for a slave was void. It will be observed that the power of attorney referred to above cotains

the word "transfer," which is certainly as broad a word as "dispose," as used in the power of attorney to O'Brien.

In the above case the court would not permit evidence to be introduced showing the scarcity of money and the general custom of the country in regard to bartering land for negroes and stock.

Hence, it follows that however convenient it may be for an agent authorized to institute suits in regard to the subject matter of the power, and to sell and dispose of the same, to bind his principal for a portion of the land in controversy, or however usual and customary this may be, these circumstances do not obviate the necessity of being expressly authorized so to do. But, even if O'Brien had implied authority to bind his principals for attorneys' fees, the agent is not "at liberty to exercise his discretion in the choice of a mode of performing the duty imposed on him, if some one mode is fixed * * * by usage."—1 Parsons on Contracts, 56. "No agent has authority to bind his principal by whatever the agent may do in reference to any subject whatever," but only to "whatever usually and naturally belongs to the doing of it."—*Id.*, 43. Who will assert that is "usual" and "customary" for an agent authorized as O'Brien was—even admitting that he had implied authority to bind his principal for attorneys' fees—that he could contract to give Branch and Sargent a portion of the land recovered?

Justice Gould says, in the case of Lamar Co. vs. Clements, 49 Texas, 347: "We are aware of no authority which would authorize, IN ANY CASE, the consideration of any other than reasonable cash attorneys' fees. The relaxation of the common law rule forbidding contingent fees out of the subject matter of litigation as champertons is simply a concession to the rights and necessities of litigants." In this case the court held that since there was no evidence as to what reasonable cash fees would be under the circumstances, but only evidence that one-half the amount recovered was usual contingent fee—that a charge to the jury that they could estimate reasonable fees as a part of the damages was unwarranted. The court further says that "the proposition that the necessitous conditions of the plaintiffs" could have anything to do with the matter "scarcely needs refutation." So in this case the proposition that

the necessitous condition of the principal, if such was the fact, would justify such an execution of the power, cannot be entertained. On this point Story says: "However urgent the necessity," the agent cannot, in use of a power of attorney, exceed the authority expressly delegated; and in the case referred to by the author the jury were not permitted to consider the necessities of the case in order to enlarge the authority of the agent.—Story on Agency, section 69. "A general agent cannot resort to extraordinary and expensive means to raise money for his principal."—Shaw vs. Stone, 1 Cush., 228. In Dupont vs. Whetherman, 10 Cal., 355, where the agent was authorized "to sell and convey," and also "to take all legal measures which may be proper for the complete recovery and enjoyment of the assigned premises," in his discretion, Justice Field, now of the Supreme Court of the United States, held that this did not authorize the agent to convey the property to third party in order to enable that party to hold possession for the benefit of the principal.

III.

As to the improper form in which the deeds were executed.

Argument and Authorities.

The form of executing the power rendered the deeds under it void at law, though not so in equity.

The deeds purport to be the acts of Philip O'Brien, agent of Eliza O'Brien and others. They do not purport to be the acts of Eliza O'Brien and others by their agent, Philip O'Brien.

The form adopted in each deed is substantially this: "I, Philip O'Brien, for myself and others named, in consideration of money to be paid 'us,' have granted, and do hereby convey, to Sargent one half of the interest which 'we' have in said estate."

Now, analyzing the language used, and who is it that does the granting? "I." Who alone is it that acts? "I," "acting for myself" and others, etc. The plural pronoun "we" is used descrip-

tively only. It is nowhere used as the nominative of the habendum clause. It nowhere appears in the deed in connection with the use of the word we—that "WE have conveyed," or that "we do convey."

While, as Story says in Clark vs. Courtney, 5 Peters, 351, in discussing this same point, "this may savor of refinement, since it is apparent that the party intended to pass the interest and title of his principal, but the law looks not to the intent alone, but to the fact whether that intent has been executed in such a manner as to possess a legal validity." So we here invoke that same spirit which forbids us in a court of law to show the failure of the consideration of these instruments, and for reasons no more refined and technical, we ask that they be excluded from the jury. The authorities hold, without exception, that the execution of a power to convey land is void at law when, from the language employed, the agent purports to act for the principal, instead of the principal acting by the agent. (See Story on Agency, section 144, *et seq*, and authorities there referred to.) "I, Philip O'Brien, agent of Eliza O'Brien, do convey, etc," is the act of the agent FOR the principal, and is void at law; but "I, Eliza O'Brien, by my agent, Philip O'Brien, do convey, etc.," is the act of the principal BY the agent, and is valid at law, as well as in equity.

The reason given for the rule as stated in Story on Agency, section 150, note 1, and section 153, is that the agent is authorized by the power to convey the land in the NAME of his principal, and the deed must, therefore, be executed in every respect as though it were the personal act of the principal.

In the case under discussion the names of the principals are correctly signed on the deeds by the agent, but this does not supply the failure of their names to appear as grantors—as those who actually grant and convey the land. Story says, section 153, "IF THE NAME OF THE PRINCIPAL BE STATED AS GRANTOR" and be signed as such, then it is the act of the principal. If the deed to Sargent read "we" do convey, etc., and were signed "Eliza O'Brien," etc., by Philip O'Brien, agent, it would doubtless be good at law, because "we" would thus be used as the subject of the granting clause and the names of the principals would appear as grantors. But is does not so read—Philip, the agent acting for

the necessitous condition of the principal, if such was the fact, would justify such an execution of the power, cannot be entertained. On this point Story says: "However urgent the necessity," the agent cannot, in use of a power of attorney, exceed the authority expressly delegated; and in the case referred to by the author the jury were not permitted to consider the necessities of the case in order to enlarge the authority of the agent.—Story on Agency, section 69. "A general agent cannot resort to extraordinary and expensive means to raise money for his principal."—Shaw vs. Stone, 1 Cush., 228. In Dupont vs. Whetherman, 10 Cal, 355, where the agent was authorized "to sell and convey," and also "to take all legal measures which may be proper for the complete recovery and enjoyment of the assigned premises," in his discretion, Justice Field, now of the Supreme Court of the United States, held that this did not authorize the agent to convey the property to third party in order to enable that party to hold posession for the benefit of the principal.

III.

As to the improper form in which the deeds were executed.

Argument and Authorities.

The form of executing the power rendered the deeds under it void at law. though not so in equity.

The deeds purport to be the acts of Philip O'Brien, agent of Eliza O'Brien and others.. They do not purport to be the acts of Eliza O'Brien and others by their agent, Philip O'Brien.

The form adopted in each deed is substantially this: "I, Philip O'Brien, for myself and others named, in consideration of money to be paid 'US,' have granted, and do hereby convey, to Sargent one half of the interest which 'WE' have in said estate."

Now, analyzing the language used, and who is it that does the granting? "I." Who alone is it that acts? "I," "acting for myself" and others, etc. The plural pronoun "we" is used descrip-

tively only. It is nowhere used as the nominative of the habendum clause, It nowhere appears in the deed in connection with the use of the word we—that "WE have conveyed," or that "we do convey."

While, as Story says in Clark vs. Courtney, 5 Peters, 351, in discussing this same point, "this may savor of refinement, since it is apparent that the party intended to pass the interest and title of his principal, but the law looks not to the intent alone, but to the fact whether that intent has been executed in such a manner as to possess a legal validity." So we here invoke that same spirit which forbids us in a court of law to show the failure of the consideration of these instruments, and for reasons no more refined and technical, we ask that they be excluded from the jury. The authorities hold, without exception, that the execution of a power to convey land is void at law when, from the language employed, the agent purports to act for the principal, instead of the principal acting by the agent. (See Story on Agency, section 144, *et seq*, and authorities there referred to.) "I, Philip O'Brien, agent of Eliza O'Brien, do convey, etc," is the act of the agent FOR the principal, and is void at law; but "I, Eliza O'Brien, by my agent, Philip O'Brien, do convey, etc.," is the act of the principal BY the agent, and is valid at law, as well as in equity.

The reason given for the rule as stated in Story on Agency, section 150, note 1, and section 153, is that the agent is authorized by the power to convey the land in the NAME of his principal, and the deed must, therefore, be executed in every respect as though it were the personal act of the principal.

In the case under discussion the names of the principals are correctly signed on the deeds by the agent, but this does not supply the failure of their names to appear as grantors—as those who actually grant and convey the land. Story says, section 153, "IF THE NAME OF THE PRINCIPAL BE STATED AS GRANTOR" and be signed as such, then it is the act of the principal. If the deed to Sargent read "we" do convey, etc., and were signed "Eliza O'Brien," etc., by Philip O'Brien, agent, it would doubtless be good at law, because "we" would thus be used as the subject of the granting clause and the names of the principals would appear as grantors. But is does not so read—Philip, the agent acting for

the principals, convey, and the mere fact of the deeds being properly signed does not make the names of the principals the subject of the granting clause; nor does it change the fact that the agent himself purports to convey for the principals instead of conveying in their names, as the rule requires. It is as though John Smith should execute an instrument thus: "Know all men by these presents, that—— ———have granted bargained,sold,etc. (Signed) John Smith." There are these two essentials requisites to a deed —John Smith's name or a pronoun in place of it must appear in two places. It must appear as the subject of the granting word, and it must also appear as the name of the signer of the instrument. Is not an omission of it in either of these places equally fatal to the deed at law? Hence, if the rule in regard to the execution of a deed by an agent is to be adhered to—and it is too well settled to be questioned at this time—then a failure of the agent to make the deed, in the granting clause, purport to be the act of the principal is as fatal at law as though it were also improperly signed by the agent. A court of law would not admit the above instrument signed by John Smith as a deed, no matter how clearly evident that John Smith intended it as such. A court of law would not supply a subject for the granting clause. A court of equity might permit it to be done, however. So in the case at bar a court of law will not substitute the pronoun "we" in place of "I" as the subject of the clause, "have granted, bargained and sold, and do hereby grant, bargain, sell * * * * one undivided one-half interest of, in and to all the property * * * * to which WE are in any way entitled, OUR interest therein being three-fourth ." "We" and "our" are used above descriptively only and must be considered in connection with the fact that the agent conveys for himself as well as for his principals. In Vanda vs. Hopkins, 1 J. J., March, Ky. 288, it was held that a bond by H. for himself and as agent of A., bound H. and might bind A. in equity. In Martin vs. Flowers, 8 Leigh, 158, though the testamentum clause recited that the deed was signed by the principal, it was nevertheless held to be the act of the agent. Same was held in Redmon vs. Cuffin, 2 Dev. Ch., North Carolina, 437. See case of Clark vs Courtney, 5 Pet., 251, also the following cases, in all of which this rule is followed, to-wit, that a conveyance by the agent for the principal is void at

law, so far as the principal is concerned: Lock vs. Alexander, 1 Hawk., N. C., 412; Fowler vs. Shearer, 7 Mass., 14; Elwell vs. Shaw, 16 Mass., 42, 4 Mass., 575; Copeland vs. Ins. Co., 6 Pick. (Mass.), 198; Coucher vs. Jergenk, 2 Pick., 392; Dawmer vs. Grundy, 2 Pick., 345; Welsh vs. Usher, 2 Hill Ch., S. C., 167; Bogart vs. De Bussey, 6 John., 94; Rossiter vs. Rossiter, 8 Wend., 494; Spencerboxer vs. McGrade, 6 Minn., 484; Holman vs. Curman, 1 Freeman Ch., 408; Monson & Bowman, 29 Cal., 337; Echols vs. Cherry, 28 Cal., 157; Love & Sierra Nevada Co. Co.

In this connection we refer the court to the case of the Agricultural Bank of Miss. et al., vs. Rice, et al., 4 How., 225. The decision is by Chief Justice Taney, and it seems to us perfectly conclusive on this point. The facts are as follows: The plaintiffs brought ejectment for the recovery of a tract of land sold by their ancestors, Martha Phipps, Mary Haile and Sarah Gibson. The defendant claimed, under a deed from the above named parties, which commences thus: "This indenture, made the * between William Phipps, in right of his wife Martha, William R. Haile, in right of his wife Mary, and David H. Gibson, in right of his wife Sarah, * * of the first part, and Noah Barlow and * of the other part, witnesseth: That the said parties of the first part, for and in consideration of * by these presents have granted, bargained, sold, conveyed and conferred," etc., etc. The deed ends as follows: "In witness whereof the said parties of the first part have hereunto set their hands and seals, this day and year above written."

The deed was acknowledged by all the grantors. It was shown that the grantors had received $40,000 in payment of purchase money, for part of which the wives had given their receipt after discoverture, and also that the grantees had erected $100,000 worth of improvements on land. The court says:

"This being an action of ejectment, the only question between the parties is upon the legal title."

"The deed also is imperative at to their title to the land. In the premises of this instrument it is stated to be the indenture of their respective husbands in right of their wives of the one part, and of the grantees of the other part—the husbands of the grantees being specifically named, and the parties of the first part there grant and

the principals, convey, and the mere fact of the deeds being properly signed does not make the names of the principals the subject of the granting clause; nor does it change the fact that the agent himself purports to convey for the principals instead of conveying in their names, as the rule requires. It is as though John Smith should execute an instrument thus: "Know all men by these presents, that—— ——have granted bargained,sold,etc. (Signed) John Smith." There are these two essentials requisites to a deed —John Smith's name or a pronoun in place of it must appear in two places. It must appear as the subject of the granting word, and it must also appear as the name of the signer of the instrument. Is not an omission of it in either of these places equally fatal to the deed at law? Hence, if the rule in regard to the execution of a deed by an agent is to be adhered to—and it is too well settled to be questioned at this time—then a failure of the agent to make the deed, in the granting clause, purport to be the act of the principal is as fatal at law as though it were also improperly signed by the agent. A court of law would not admit the above instrument signed by John Smith as a deed, no matter how clearly evident that John Smith intended it as such. A court of law would not supply a subject for the granting clause. A court of equity might permit it to be done, however. So in the case at bar a court of law will not substitute the pronoun "we" in place of "I" as the subject of the clause, "have granted, bargained and sold, and do hereby grant, bargain, sell * * * * one undivided one-half interest of, in and to all the property * * * * to which WE are in any way entitled, OUR interest therein being three-fourth." "We" and "our" are used above descriptively only and must be considered in connection with the fact that the agent conveys for himself as well as for his principals. In Vanda vs. Hopkins, 1 J. J., March, Ky. 288, it was held that a bond by H. for himself and as agent of A., bound H. and might bind A. in equity. In Martin vs. Flowers, 8 Leigh, 158, though the testamentum clause recited that the deed was signed by the principal, it was nevertheless held to be the act of the agent. Same was held in Redmon vs. Cuffin, 2 Dev. Ch., North Carolina, 437. See case of Clark vs Courtney, 5 Pet., 251, also the following cases, in all of which this rule is followed, to-wit, that a conveyance by the agent for the principal is void at

law, so far as the principal is concerned: Lock vs. Alexander, 1 Hawk., N. C., 412; Fowler vs. Shearer, 7 Mass., 14; Elwell vs. Shaw, 16 Mass., 42, 4 Mass., 575; Copeland vs. Ins. Co., 6 Pick. (Mass.), 198; Coucher vs. Jergenk, 2 Pick., 392; Dawmer vs. Grundy, 2 Pick., 345; Welsh vs. Usher, 2 Hill Ch., S. C., 167; Bogart vs. De Bussey, 6 John., 94; Rossiter vs. Rossiter, 8 Wend., 494; Spencerboxer vs. McGrade, 6 Minn., 484; Holman vs. Curman, 1 Freeman Ch., 408; Monson & Bowman, 29 Cal., 337; Echols vs. Cherry, 28 Cal., 157; Love & Sierra Nevada Co. Co.

In this connection we refer the court to the case of the Agricultural Bank of Miss. et al., vs. Rice, et al., 4 How., 225. The decision is by Chief Justice Taney, and it seems to us perfectly conclusive on this point. The facts are as follows: The plaintiffs brought ejectment for the recovery of a tract of land sold by their ancestors, Martha Phipps, Mary Haile and Sarah Gibson. The defendant claimed, under a deed from the above named parties, which commences thus: "This indenture, made the * between William Phipps, in right of his wife Martha, William R. Haile, in right of his wife Mary, and David H. Gibson, in right of his wife Sarah, * * of the first part, and Noah Barlow and * of the other part, witnesseth: That the said parties of the first part, for and in consideration of * by these presents have granted, bargained, sold, conveyed and conferred," etc., etc. The deed ends as follows: "In witness whereof the said parties of the first part have hereunto set their hands and seals, this day and year above written."

The deed was acknowledged by all the grantors. It was shown that the grantors had received $40,000 in payment of purchase money, for part of which the wives had given their receipt after discoverture, and also that the grantees had erected $100,000 worth of improvements on land. The court says:

"This being an action of ejectment, the only question between the parties is upon the legal title."

"The deed also is imperative at to their title to the land. In the premises of this instrument it is stated to be the indenture of their respective husbands in right of their wives of the one part, and of the grantees of the other part—the husbands of the grantees being specifically named, and the parties of the first part there grant and

convey to the parties of the second part. The lessors of the plaintiff are not described as grantors, and THEY USE NO WORDS TO CONVEY THEIR INTEREST. It is altogether the act of the husbands, and they alone convey. Now in order to convey by grant, the party possessing the right must be the grantor, AND USE APT WORDS TO CONVEY TO THE GRANTEE, and merely signing and sealing and acknowledging an instrument in which another person is grantor is not sufficient"

"Assuming it (the acknowledgement) to be entirely regular, it would not give effect to the conveyance of their interests made by the husbands alone; and as to the receipt of the money mentioned in the testimony after they become sole possessors, it certainly could not operate as a legal conveyance passing the estate to the grantee, nor give effect to a deed which as to them was utterly void."

The courts of our own State recognize this rule, and hold that, though the intention to bind the principal is evident, yet an equitable title only from the principal will vest in the grantee; but since with us no distinction is recognized in the administration of law and equity, practically such an equitable title is as good for all purposes as a legal title in the courts of Texas. See Eckhart vs. Reidel, 16 Tex., 65. This doctrine, of course, will not apply in a Federal court, where the distinction between law and equity is preserved.

The effect of the conveyance to Sargent and Branch being, at most, but to vest in them an equitable title, the authorities are conclusive to the effect that in ejectment an outstanding equitable title cannot be shown: Fitch vs. Boyer, 51 Tex., 337; Johnson vs. Timmon, 50 Tex.. 537; Lawrence vs. Madegan, 1 Dill., U. S. Circuit Court, R. 455; Brolaskey vs. McClain, 61 Pa., 146, where it was held that a trustee could maintain ejectment without joining the *cest que trust*. See also Cawsey vs. Davis, 13 Ala., 833. In Smith vs. Allen, 1 Blackf. Ind., 22, it was held that an equitable title could not be set up in opposition to legal title in ejectment.

BRADY & RING,
Attorneys for Defendant in Error.

APPENDIX B.

[On the Plea in Abatement.]

In addition to what is shown on page 2, *ante*, we desire to submit the following:

By statute law in Texas, a defendant cannot complain of the non-joinder of any person as a co-defendant unless such non-joinder operates to his prejudice. This is evident from the following extracts: Chapter entitled "Abatement and Discontinuance of Suit," R. S., 1879, article 1259. "The court may permit the plaintiff to discontinue his suit, as to one or more of several defendants who have been served with process, or who may have answered when such discontinuance would not operate to the prejudice of the other defendants. * *" Plaintiffs below, therefore, had a right to dismiss as to E. J. Gurley since E. G. Hanrick could in no way have been prejudiced by such dismissal, and hence Gurley was not a necessary party defendant.

Article 4807, R. S, 1879, from chapter entitled "Trespass to Try Title," reads "when there are two or more plaintiffs or defendants, any one or more of the plaintiffs may recover against one or more of the defendants the premises or any part thereof, or any interest therein, or damages, according to the rights of the parties."

If E. J. Gurley was a necessary party, non-joinder of whom was ground for abating the suit as to E. G. Hanrick, then no cause of action sufficient to stop the running of the statute of limitations was stated by plaintiffs below,—a manifest absurdity. If defendants below desired additional parties made, the proper cause for them to pursue was not by a plea in abatement, but by a simple